SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 486

LESTER FOLLETT, APPELLANT,

vs.

TOWN OF McCORMICK, SOUTH CAROLINA

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 23, 1943.

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[fol. 1]

IN THE SUPREME COURT OF SOUTH CAROLINA

TOWN OF MCCORMICK, Respondent

vs.

LESTER FOLLETT, Appellant

STATEMENT ON APPEAL

This is a criminal action commenced on the 20th day of March 1942, by the town of McCormick against the appellant Lester Follett for the alleged offense of Selling or Offering to Sell Books in the Town of McCormick without a license, and was tried before the mayor of said town and a jury on the 21st day of March 1942. Appellant was convicted and was sentenced by the mayor to pay a fine of Fifty Dollars or serve twenty days in the city jail. He appealed to the circuit court where the appeal was heard on the 6th day of October, 1942, by the Hon. E. C. Dennis, presiding judge, who took the matter under advisement and on the 2nd day of November, 1942, filed an order affirming the judgment below. In due time appellant served notice of intention of appeal, and does now appeal, to the Supreme Court from the said order and from the judgment thereon.

The appellant contended that he was and is a regularly ordained minister of the Gospel working as such under the auspices of the Watchtower Bible & Tract Society, 117 Adams Street, Brooklyn, New York, an organization duly chartered under the laws of the state of New York, for the purpose of disseminating and preaching the gospel of God's Kingdom under Christ Jesus, by word of mouth, by the printed page, and otherwise. Appellant contended that as a part of his duties as a minister of the Gospel, and incidental thereto, the appellant placed a book appertaining to his faith with one of witnesses for the town, one Flavores Cade, and received from her a contribution of 25c which [fol. 2] contribution was designed to aid in the work in which he was engaged by defraying the cost of printing more books of like kind to be used in the teaching of God's word to others.

There was placed in evidence the credentials of appellant, that is to say, a certificate duly signed by an authorized

officer of the society certifying him to be a duly ordained minister of the Gospel, which certificate is hereinafter set out in full.

He was not represented at the trial by an attorney. At the close of the testimony the appellant made a motion for a directed verdict of not guilty on the ground that the ordinance is in direct violation of the Fourteenth Amendment of the Constitution of the United States in that it restricts the freedom of speech, freedom of the press, freedom of worship of Almighty God; also, on the ground that there was no testimony that he had sold a book.

"Children", the book in question, the booklet, "End of Axis Powers", and "The Watchtower", exhibits in the case, are filed separately.

[Front of Certificate]

This is to certify that Lester Follette whose signature appears below, is an ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus and that said person is one of Jehovah's witnesses. The Watch Tower Bible & Tract Society, created and organized and chartered by law to preach the gospel of God's Kingdom, sends forth Jehovah's witnesses to do this work as commanded by the Almighty God. Jehovah's witnesses are [fol. 3] ordained and commissioned by God, and the signer of this card Scripturally claims such ordination and commission, as set forth in the Bible at Isaiah 61:1, 2; Isaiah 43:9-12; Matt. 10:7-12; Matt. 24:14; Acts 20:20; 1 Peter 2:21; 1 Cor. 9:16. Being one of Jehovah's witnesses, the signer must obey God rather than men. (Acts 3:23; Acts 4:19; Acts 5:29) Jehovah's witnesses, in obedience to God's commandments, preach the gospel and worship Almighty God by calling upon people at their homes, exhibiting to them the message of the gospel of said Kingdom in printed form. Bibles, books, booklets, and magazines are offered free to those that are poor, or on contribution, which contribution is accepted for the publishing of other literature so that the Word of the Lord may have greater circulation in all this world for a witness, giving other people the opportunity of learning of God's gracious provision for them. Said witness of Jehovah is doing this work of his own volition and is bearing the testimony before the people

in accordance with the provisions of the fundamental laws of this land and in obedience to God's commandment, which is supreme. Any kindness shown this witness of Jehovah will be greatly appreciated and is certain to call forth the blessing of the Lord upon the one showing such kindness. (Matt. 25:31-46) The Society or its appointed representatives will be pleased to furnish authoritative proof as to whether the signer of this card is one of Jehovah's witnesses.

Watch Tower Bible & Tract Society, by N. H. Knorr, President.

Lester Follette, McCormick, South Carolina.

[fol. 4] [Back of Certificate]

Today many are in perplexity as to what to do to protect and safeguard the interests of themselves and their children. The remedy for the present unhappy condition is the rule of the earth by righteous powers. God has made it possible to now learn just how and when such righteous rule will come into full control.

The great and comforting truths in the Bible are set forth in the book entitled Children. It contains instructions for all who would be children and subjects of the great Lord and King Christ Jesus. It is not religious, but fills the sincere heart with contentment and hope. It is not a child's book, but is for adults and children as well. Here is a copy for you, and you may contribute twenty-five cents to help publish more like books.

Read Children, rejoice and live.

[fol. 5] In Mayor's Court of Town of McCormick

Statute Involved

Be It Ordained by the Town Council of the town of McCormick in council assembled, and by the authority of the same.

Section—That the following license on business, occupation and professions to be paid by the person or persons carrying on or engaged in such business, occupation or pro-

fessions within the corporate limits of the Town of McCormick, South Carolina:

Agents selling books, per day $1.00, per year $15.00.

Following all the evidence the defendant made a motion for a directed verdict, which is as follows:

IN THE MAYOR'S COURT OF THE TOWN OF McCORMICK

MOTION FOR DIRECTED VERDICT

The defendant moves for a directed verdict on the grounds:

(1) That there is no testimony that he had sold or offered for sale a book within the Town limits of the Town of McCormick.

(2) That the Ordinance requiring the defendant to secure a license is in direct violation of the 14th Amendment of the Constitution of the United States in that it restricts the freedom of speech, freedom of the press and the freedom of worship of Almighty God.

Wherefore defendant prays that this Court enter a judgment discharging the defendant upon a finding of "not guilty".

[fol. 6] IN THE MAYOR'S COURT OF THE TOWN OF McCORMICK

TESTIMONY

The following is a statement of T. J. Sibert, mayor, who tried the case concerning part of the evidence heard by him:

Lester Follett testified that the books he had were shipped to him by Jehovah's witnesses, that when he disposed of the books he paid for the books. He further testified that he obtained his living from the money received from those with whom he placed books, that he had no other source of income.

The following is substantially the testimony given by Lester Follette in his own behalf:

My name is Lester Follett. I live in McCormick, South Carolina. I am a regular ordained minister and fully consecrated to do the will of Almighty God as set forth in the

following texts: "Ye are my witnesses saith Jehovah that I am God". (Isa. 43:10-12) "The spirit of the Lord God is upon me because the Lord hath anointed me to preach good tidings unto the meek, he hath sent me to bind up the broken-heatred, to proclaim liberty to the captives and the opening of the prison to them that are bound, to proclaim the acceptable year of the Lord and the day of vengeance of our God, to comfort all that mourn." (Isaiah 61:1, 2) "And this gospel of the kingdom shall be preached in all the world for a witness unto all nations and then shall the end come." (Matt. 24:14) As the apostles were sent forth by the Lord Jesus Christ so I am sent forth. They went from house to house preaching the gospel orally; I am doing so by going from house to house presenting the gospel of [fol. 7] the kingdom in printed form. I am called to follow in the footsteps of Jesus, for even hereunto were ye called for Christ also suffered leaving us an example, that ye should follow in his steps. (2 Pet. 2:21) I here offer in evidence a card containing a certificate of ordination, also a testimony. I was not selling. I was placing the books on a contribution.

IN THE MAYOR'S COURT OF THE TOWN OF MCCORMICK

NOTICE AND GROUNDS OF APPEAL

To T. J. Sibert, Esq., Recorder of the city of McCormick, and to J. Fred Buzhardt, Attorney for said city:

Please Take Notice that the defendant above named intends to and does hereby appeal to the Court of General Sessions for McCormick County, from judgment of conviction entered against him March 21st, 1942, by said recorder, upon the ground that the recorder erred in not sustaining defendant's motion to dismiss, on the ground that the ordinance is in direct violation of the Fourteenth Amendment of the Constitution of the United States, in that it restricts the freedom of speech, freedom of press, and freedom of worship of Almighty God; the same being a good and valid objection to the ordinance upon which said warrant or complaint is based, for the reasons stated in said motion to dismiss, which is incorporated herein, the same as if here repeated at length; in not sustaining defendant's motion to direct the verdict; and in not dismissing said charge against the defendant.

[fol. 8] IN THE CIRCUIT COURT OF GENERAL SESSIONS FOR McCORMICK COUNTY

MAYOR'S RETURN

Lester Follett was arrested in the Town of McCormick and charged with voilating one of the Town ordinances in that he sold or offered to sell within the Town limits of the town of McCormick certain books on two different dates without having obtained a license to sell books.

When the case was called, the defendant, Follett, pleaded not guilty and demanded a jury trial. His request was granted and a number of witnesses testified on behalf of the town, that on the dates charged, the defendant, Follett, offered to and did sell books entitled "Children" within the town limits of the town of McCormick. The defendant, Follett, testified in his own behalf; he denied selling books but testified that he had distributed literature on the dates mentioned in the town of McCormick and had left books with people who would "make a contribution" to him of twenty-five cents. The witnesses for the town testified that no mention of a contribution was made but that the defendant offered to and did sell the books. It was testified on behalf of the town that the defendant had failed and refused to obtain a license from the town clerk as required by town ordinance; this the defendant admitted. At the close of the testimony, the defendant moved for a directed verdict of not guilty, on the grounds that the ordinance was in violation of the United States Constitution in that it restricted the freedom of worship. This motion was overruled and the defendant was found guilty by the jury. He was sentenced [fol. 9] by the court on each charge to pay a fine of $50.00 or be imprisoned, or work on the county chain gang for a period of twenty days.

Within due time notice of appeal was given, the notice being attached to this statement, and the defendant was admitted to bail.

IN THE CIRCUIT COURT OF GENERAL SESSIONS FOR McCORMICK COUNTY

OPINION AND ORDER—November 2, 1942

The defendant above named was convicted by a jury in the Mayor's Court of the City of McCormick of a violation

of an ordinance of the city in that he sold within the limits of the city certain books without having obtained a license to sell the books.

The ordinance provided that a license must be procured before carrying on certain kinds of business and among the requirements was an agent selling books. The ordinance provided that an agent selling books should pay a license before offering to sell or selling books. It is not in dispute that the defendant had not paid the license. The defendant claims that the books were not sold by him but would be left with any one contributing the sum of twenty-five cents. The witnesses for the Town testified that nothing was said about contribution that the books were sold to them for the sum of twenty-five cents each. At the close of the testimony the defendant moved for a directed verdict on the ground that the ordinance was in violation of the Constitution of the United States in that it restricted the freedom of worship. His motion was refused and the jury found him guilty. He then appealed to this Court on the ground that the Mayor erred in not sustaining de- [fol. 10] fendant's motion to dismiss on the ground that the ordinance is in direct violation of the Fourteenth Amendment of the Constitution of the United States in that it restricts the freedom of speech, the freedom of press and freedom of worship of Almighty God. The defendant claims that he was an ordained minister but the only evidence of his being ordained was a certificate of the Watchtower Bible and Tract Society by its president. As I understood his claim it is that he was ordained a minister by God himself and is sent forth by the Watchtower Bible and Tract Society as their representative. That is what appears from the certificate which he introduced in evidence to show that he is a minister.

The defendant testified that the books were shipped to him by the Society, that when he disposed of the books he paid for them. He further testified that he made his living from the money received from those with whom he placed the books, that he had no other source of income. The book he sold has the title "Children". The claim is that the book is not a child's book and a reading of the book shows definitely that it is not capable of being understood by a child but appears to be a name given the book for the purpose of concealing what it really is.

The claim is that the book is a religious one and therefore not subject to the requirement that a license be paid. To show that the book is not religious on Page 207 there is this statement: "Religious organizations furnish no protection whatsoever to the people. Religion is entirely contrary to [fol. 11] the will of God and is a snare. Today religion is fully united with dictators or arbitrary rulers of the earth". On Page 227 this quotation: "In modern times the colleges and universities and particularly so-called theological schools teach anything and everything but the Gospel. There are numerous religious denominations which preach their own doctrines". On Page 232: "The message of God's Word necessarily exposes religion as the instrument of Satan used to deceive the people." On Page 258: "Religious ceremonies produce no good results and are in vain and injurious. Religion is heathenish". Page 245: "Religion is demonism". Page 335: "Today the religious organizations have and exhibit a form of godliness and perform ceremonies, claiming to honor God, but in fact they are against God."

It appears from this that the defendant is not in truth a minister but is an agent appointed by the Watchtower Bible and Tract Society and that the book he was selling is not a religious book at all.

At the time he undertook to sell and did sell this book he also distributed copies of a pamphlet entitled "End of Axis Powers". This name is entirely misleading.

The Society is undertaking to defy all government and to set up what they call Theocracy. The Watchtower seems to be undertaking also to oppose all government and to advocate a Theocracy. It is impossible to understand what they mean and it is apparently only an effort to discredit all government now in existence.

[fol. 12] Quoting from this pamphlet "End of Axis Powers" on Page 9:

"The obligation and commission of Jehovah's witnesses is to proclaim the truth of and concerning The Theocracy, which will enable the people to intelligently choose".

Page 10: "The facts are indisputable, and therefore admitted, that the Nazis, Fascists and the mightiest religious organization on earth, acting together and designated as "the Axis Powers", now rule from Norway to Egypt and

within that realm the people mourn. That ruling power is opposed to the Kingdom of God under Christ and violently opposes everyone who advocates The Theocracy".

"Opposing the Nazi, religious combine is another mighty world power, carried on by the political and commercial strong men of those nations, and ably supported by religious leaders. That world power is generally known as the advocate of Democracy, and during the World War from 1914 to 1918 adopted and used the slogan: "This war will make the world safe for democracy". That ruling power does not advocate the kingdom of God and hence is against The Theocracy."

Page 27: "The only hope for peace and life rests in The Theocratic Government. All persons now on earth who expect or hope to live must flee to that righteous government, and all others shall be destroyed."

Quoting from the "Watchtower" of date March 15, 1942, one of the exhibits:

"Hence the conspiracy of the worldly rulers, under the religious guidance of the demonized clergy, to block The [fol. 13] Theocracy and to continue misruling the earth, is a flagrant disregard of God's law and testimony as set forth in the Bible and declared by his witnesses. It is gross iniquity and is abominable in his sight, and it deceives the whole world because it operates under the cloak of religion.

"And the prophets thereof divine for money. The clergy of 'Christendom' divine or make predictions to please the dictators or the political leaders. The political schemes and programs of such they support and make unscriptural promises for them. They turn the people away from the sure and infallible prophecies of God's Word, and speak great things in behalf of the 'new world order,' or the 'new League of Nation'; which proposals of men are opposed to the rule of Jehovah's Theocracy. For all their divination and religious service they expect and eagerly accept money, no matter how filthy the source thereof.

"In the present conflict for world domination the controlling powers of 'the king of the north' and the rival 'king of the south' seek to gain the victory and establish themselves as the capital organization over the new-world federation of nations. According to the prophecies, neither shall win complete victory, and organized religion will deal

with both 'kings,' recognizing both as the 'higher powers,' and will herself seek to dominate them both as a supernational spiritual government. Religion and rulers will allow no place for national spiritual government. Religion and rulers will allow no place for Jehovah's message nor for his Theocracy. Such vain imaginations and wicked [fol. 14] devices shall not stand. Their Final End shall be at God's appointed time, at Armageddon. They are now in their last days, and Jehovah establishes his capital organization in power and glory, and it stands for ever.

"In 1918 Jehovah, figuratively speaking, laid Christ Jesus his King as the 'precious corner stone' in Zion, and defiantly says to all the many antichrists opposing The Theocracy: 'Yet have I set my king upon my holy hill of Zion.' (Ps. 2:6) The 'war in heaven' began at Christ's enthronement in 1914, and in that war Satan and his demon hosts were defeated and cast out of heaven and down to the earth and put under Christ's feet, debased to the position of a footstool.

"It was 'the king of the south' that pushed the League of Nations in 1918-1920, and he now suggests a revival of such League of Nations to secure the expected 'Peace and Safety' and to guarantee the freedoms promised to the people. The Vatican-Nazi-Fascist-totalitarian combine, or 'king of the north', proposes a 'new world order' and has already begun the nucleus of his 'new League of Nations' on the European continent. All such super-governments are the 'hills of the mountains of Christendom'. Prophecy indicates that at the close of the conflict 'the king of the north' and 'the king of the south' will, under the political strategy of the Vatican, come to a compromise agreement and will set up a 'new moral order,' a federated world under a super-government, pictured as the 'scarlet-colored beast' on the back of which there rides religion, the dominant part of which is the Roman Catholic Hierarchy. Today, in the compliance with the sly scheme of that Hierarchy [fol. 15] for world domination, the Catholic and Protestant and Jewish religious organizations hypocritically act out a 'good neighbor' policy. Such religious federation may be expected to do at such future event as the Federation of Churches in America did in 1920, to wit, call the new political-religious world confederation the political realization of the kingdom of the Messiah. So doing, they commit

gross blasphemy and finally and completely reject Jehovah's building of his Theocratic Government under Christ.

"By now millions have heard the good news, and many thousands have joyfully accepted the message, turned their backs on religion, and turned their steps toward the glorious mountain of The Theocracy.

"Concerning the two world-powers fighting each other for world domination, namely 'the king of the north' and the 'king of the south', Daniel 11:27 says: 'They shall speak lies at one table [of the god of this world],' and feed upon the same provender. (1 Cor. 10:21) They ignore God's Word concerning his kingdom and all evidence of the setting up of the same. Imbued with their imperialistic idea, they go on to carry out Satan's purpose in preparing for his final stand to rule the earth, at the battle of Armageddon.

"Among these signs, or 'wonders', done and performed by the two-horned beast may be mentioned, to wit: the establishment by it of the greatest empire of earth, ruling both the land and the sea; the gaining of supremacy in the winning of the World War; the promoting of great re- [fol. 16] ligious missionary movements; the publishing and distribution of millions of Bibles, engineered by the clergy who themselves do not believe the Bible, but which is done to deceive the people into understanding that these nations are Christian; the capture and controlling of the banking power of the world; the capturing of the 'holy city' of Jerusalem in 1917; the taking of the lead in the peace treaties of the world; the supplying of the chief portion of the money for the healing of the wounded head of the 'sea beast' till the rise of Hitler."

It is apparent from these quotations that this man is a member of a band which calls themselves Jehovah's witnesses but that their organization is not religious but is an attempt to set up an earthly government and is opposed to all forms of government as now existing whether autocratic or democratic.

It seems to me clear that the defendant violated the ordinance in that he sold the books which were not religious books and that he is not a religious minister but is some other kind of minister known only to Jehovah's witnesses and without any church or religious organization.

I have undertaken to give this matter considerable attention for the reason that this organization has caused trouble

in a number of counties in this State and it has been taken for granted that this was a religious organization. They maintain an attorney in the city of Atlanta who travels to the different counties of this State for the purpose of arguing the appeals from conviction. It seems to me to be well organized wordly power which is not only not religious but is outspoken in its opposition to religion. The [fol. 17] appellant relied on the case of the State against Meredith 197 SC, Page 351. The facts of this case are so different from that one that I do not think it applicable. The judgment of the Mayor's Court is affirmed.

(Signed) E. C. Dennis, Presiding Judge.

Darlington, South Carolina, November 2, 1942.

In the Circuit Court of General Sessions for McCormick County

Notice of Appeal

To Jeff Griffin, Solicitor of the Eleventh Judicial Circuit, Saluda, South Carolina, and Mr. J. Fred Buzhardt, Attorneys for State of South Carolina and City of McCormick, Plaintiffs-Respondents:

Take notice that the defendant in the above styled action intends to appeal and does appeal from the verdict rendered by the jury in the Recorder's Court, McCormick, South Carolina, and the sentence imposed, and the order of Hon. C. E. Dennis, presiding judge of the Circuit Court, dated November 2, 1942, affirming the judgment of conviction in the Recorder's Court, upon the grounds and exceptions hereinafter to be served upon you.

(Signed) Grover C. Powell, Attorney for Defendant-Appellant.

[fol. 18] Service of the foregoing notice of appeal accepted at McCormick, South Carolina.

This 9th day of December, 1942.

(Signed) J. Fred Buzhardt, Attorney for the City of McCormick.

IN THE CIRCUIT COURT OF GENERAL SESSIONS FOR McCORMICK COUNTY

EXCEPTIONS

The court below erred in its judgment of conviction of defendant upon the following grounds and exceptions hereinafter set forth:

Ground No. One—The court erred in convicting defendant under the commercial ordinance as all the facts show that defendant is a regular ordained minister and his work of distributing the book on a contribution or "sale" was merely collateral to the main purpose in which he was engaged, which was to preach and teach the tenets of his Christian faith and belief, and, therefore, not "peddling", and did not come within the terms of the commercial ordinance governing peddling.

Ground No. Two—The undisputed evidence shows that defendant's activity does not constitute "peddling" within the true meaning of said ordinance and that there was no sale or selling or bartering as those terms are properly defined within the meaning of the law as applied to ordinary commercial transactions because there was no commercial money or profit contemplated by defendant.

Ground No. Three—The ordinance as construed by the [fol. 19] court below to apply to the activity of defendant in preaching the Gospel and distributing literature is unconstitutional and void because as so construed and applied defendant's rights of freedom of press and freedom of worship of Almighty God are abridged and denied contrary to the South Carolina Constitution without equal protection and due process of law.

Ground No. Four—The ordinance in question as construed by the court below to apply to the activity of defendant in preaching the gospel and distributing literature is unconstitutional and void because as so construed and applied it abridges and denies defendant his rights of freedom of press and of worship of Almighty God and is an excessive burden thereon, all contrary to the First and Fourteenth Amendments to the United States Constitution.

Ground No. Five—Because appellant was, and is, a regularly ordained minister of the Gospel and was not engaged

in any commercial transaction but on the contrary was merely engaged in the exercise of his calling as a minister of the Gospel and the distribution of literature was a part of the exercise of his calling as such minister of the Gospel and was incidental thereto, and was therefore expressly exempt by statute from the power of the town to impose a license thereon.

Ground No. Six—Error of the court below in not holding that the arrest, trial, and conviction, of appellant, were void because the prosecution was not based on information [fol. 20] under oath as required by law and because no warrant for arrest of appellant was ever issued.

Ground No. Seven—Error of the court below in not dismissing the prosecution for want of jurisdiction for the reason that no warrant of arrest was ever issued for appellant.

Ground No. Eight—Because the judgment is contrary to the law and the evidence.

IN THE CIRCUIT COURT OF GENERAL SESSIONS FOR McCORMICK COUNTY

AGREEMENT AS TO RECORD

We hereby agree that the within and foregoing shall constitute the case upon which the above appeal shall be heard by the Supreme Court.

J. Fred Buzhardt, Attorney for Respondent; Grover C. Powell, Attorney for Defendant-Appellant.

[fol. 21] IN THE SUPREME COURT OF SOUTH CAROLINA

TOWN OF McCORMICK, Respondent,

vs.

LESTER FOLLETT, Appellant

Appeal from McCormick County, E. C. Dennis, Judge

Grover C. Powell, of Atlanta, Georgia, and C. E. Cooley, of Anderson, for appellant.

J. Fred Buzhardt, of McCormick and Solicitor Jeff D. Griffith, of Saluda, for respondent.

OPINION—Filed August 26, 1943

AFFIRMED

STUKES, A.J.:

Appellant was convicted in the Mayor's Court of the Town of McCormick and sentenced to pay a fine of $50.00 or be confined in jail for twenty days for violation of a municipal ordinance prescribing an occupational license tax. The classification in which he fell is as follows: "Agents selling books, per day $1.00, per year $15.00."

The instances of violation to which the evidence referred were of the sales of a cloth bound book entitled "Children", and containing three hundred and sixty-eight pages of text with an elaborate index, purporting to be of an edition of three million copies, which cost the purchasers twenty-five cents each, but appellant contended that such price was a contribution. However, he admitted in testimony that he had no other income, living upon the profits of his sales or "contributions," and remitted to the publisher for the books after he disposed of them. The record indicates that he distributed other literature published by the Watch Tower Bible and Tract Society, Inc., of Brooklyn, New York, but the prosecution and conviction involved the book mentioned, "Children," and only it was given this Court as an exhibit on the argument of the case.

After conviction and sentence, defendant appealed to the Circuit Court of General Sessions upon the ground that the prosecution should have been dismissed because the ordinance as here applied is in violation of the Fourteenth Amendment of the Federal Constitution (extending

against the States the prohibitions of the Bill of Rights, the first eight amendments,) in that it restricts freedom of speech, freedom of press and freedom of worship. It was also urged at the trial that there was insufficient testimony of an actual sale or sales of the books within the corporate limits of the Town of McCormick, but that ground was abandoned upon appeal to the Circuit Court. It may be said, however, that the conviction was upon trial by jury and they had ample evidence before them to sustain their finding of sales.

The appeal came before the Honorable E. C. Dennis, presiding Judge, who heard the arguments thereon and took them under advisement for considerable time, afterward filing his order dated November 2, 1942, in which he sustained the conviction. The order is interesting and [fol. 22] demonstrates his close study of the record and general careful consideration of the case. From it appellant has brought his appeal to this, the Court of last resort of this State.

We agree with the trial Judge in his observation that our decision of State vs. Meredith, 197 S. C. 351, 15 S. E. (2d) 678, is not apposite. There it was found that the defendant was an itinerant minister of Jehovah's Witnesses and the sale by him of a book (apparently a different one from that involved here) in a rural community "was merely collateral to the main purpose in which he was engaged, which was to preach and teach the tenets of his religion," with no profit motive involved. The statute there invoked (the state hawkers and peddlers license law) was properly held inapplicable and the decision of constitutional questions was expressly avoided.

Here the appellant contended in evidence and argument that he is an ordained minister of the same sect and he introduced in evidence a certificate of such of the Watch Tower Bible and Tract Society but there is no doubt of the fact, established in evidence, that he earns his living by sale of the books, having no other occupation. This clearly takes him out of the rule of State vs. Meredith. It will hardly be contended that any other minister may make his living by the sale of books and, should he engage in his occupation in the Town of McCormick, not be subject to the moderate license of $15.00 per year prescribed by the ordinance under attack

It may be conceded that the book in question is a religious book. Tested by the tenets of other forms of the Christian religion with which we are familiar, it is full of heresies. But it purports to offer a plan of salvation of the human soul in life after death, based upon quotations from the Bible, so we conclude without difficulty that its publication and distribution come within the words, "exercise of religion," as they are used in the constitution. Appellant's sect undertakes to make a now unimportant and obscure distinction between religion and Christianity, and on the back of his certificate of ordination, in evidence, is the following statement with reference to the book: "It is not religious, but fills the sincere heart with contentment and hope. It is not a child's book, but is for adults and children as well. Here is a copy for you, and you may contribute twenty-five cents to help publish more like books. Read CHILDREN, rejoice and live."

It is interesting to note that the able and long-experienced Judge who heard the case on circuit sat as an Acting Associate Justice of this Court in State vs. Langston, (1940), 195 S. C. 190, 11 S. E. (2d) 1, a case affirming the conviction of other Jehovah's Witnesses of breaches of the peace. In his opinion for the Court he said: "In this State there are so many religious beliefs, so varied in what they teach and with such great differences, that one of the most fruitful, and yet fruitless, sources of argument is some theological question. It certainly cannot be said that there is not in this State an absolute freedom of religion."

For convenient reference the portion of the first amendment of the Federal Constitution, urged in opposition to the municipal ordinance under review, is here set out:

> "Congress (or a State or subdivision thereof—interpolated) shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or abridging the freedom of speech, or of the press. * * *"

It seems, and is, a very far cry from the import of the foregoing clause to the occupational license ordinance in question. Does application of the latter to appellant's sale of religious books violate the constitution? Answering similar questions has troubled other Courts. In 141 A. L. R., [fol. 23] beginning at page 538, is an enlightening annotation upon the subject following report of the five to four

decision in Jones vs. Opelika, and other cases, 316 U. S. 584, 62 S. Ct. 1231, 86 L. Ed. 1174, 141 A. L. R. 514. The following excerpts (pages 540 and 542) from the editorial comment found in the annotation appear to be a fair summary of the decided cases upon the subject up to that time:

> "The effect of the cases, taking them as a whole, seems to be that the sale, and also, presumably, the distribution without charge, of books and pamphlets dealing with religious subjects may be reasonably regulated as to time, place, and manner, without there being any invasion of religious freedom as protected by Federal and State Constitutions. Furthermore, transactions of sale and solicitation of sale of such literature may be subjected to reasonable and non-discriminatory taxation."

> "In nearly every case wherein the question has been presented, the view has been taken that a reasonable nondiscriminatory license tax imposed upon the sale of religious literature from door to door is not invalid as an invasion of religious liberty guaranteed by constitutional provisions."

But the Supreme Court of the United States "went up the hill and down again" in its decision of Jones vs. Opelika, supra, and vacated it in another equally closely divided decision. This action was coincidental with its decision of Murdock vs. Pennsylvania and seven other cases, 63 S. Ct. 870, (advance sheet No. 13, May 15, 1943), also by five to four. Does this last decision of that high Court, whose view is of course controlling upon the question involved, indicate reversal of the conviction and sentence of appellant? After most careful consideration, we do not think so. The facts of the Murdock case are materially unlike those of appellant's, although they appear to be members of the same religious sect. In view of what has been said of the case at bar it would perhaps be sufficient to point out that in the leading opinion in Murdock's case it was clearly said: "The cases present a single issue—the constitutionality of an ordinance which as construed and applied required religious colporteurs to pay a license tax as a condition to the pursuit of their activities." 63 S. Ct. at page 873. On the contrary, in the case in hand, we have the conviction of a resident of a town, the ordinance

of which is involved, who earned his living by the sale of books and did so within the town without obtaining the required license, which latter would have cost him $1.00 per day or $15.00 per year. He was literally "selling books," the words of the ordinance.

The Supreme Court in its majority opinion in *Murdock* had in contemplation an itinerant preacher, and expressly referred to such; but this case, so far as the record discloses, does not involve an itinerant. The dictionary definition, and the commonly accepted meaning, of an "itinerant" is one who travels from place to place. However, the appellant was selling books in the town of his residence. "Itinerant," used as an adjective by the Supreme Court, means: "Passing or traveling about the country; going or preaching on a circuit; wandering." Webster's New International Dictionary, Second Edition, Unabridged, G. & C. Merriam Company, 1939. It is certainly not a distortion of the facts (see 63 S. Ct. at page 874) in this case to find, which we do, and hold, as did the lower Courts, that appellant's occupation was that of selling books and not that of colporteur.

Furthermore, the Supreme Court based its acquittal of Murdock partly, at least, upon the ground that, quoting from 63 S. Ct. at page 876, "itinerant evangelists moving through a state or from state to state would feel immediately the cumulative effect of such ordinances as they [fol. 24] become fashionable." But there is no evidence in the record as has been pointed out, that appellant was "moving through a state or from state to state." In fact, as has been said, he was convicted for the violation of an ordinance of his home town. We think it clear that the reasoning in Murdock's case is inapplicable to this for the patent reason of the differing facts.

The majority of the Court there said (63 S. Ct. at page 874): "Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital." Undoubtedly, this is such a case but we think the sales proven were more commercial than religious. The license was required for the selling of books, not for the spreading of religion.

The contentions with reference to the constitutional inhibition against abridging the freedom of speech or of the press, are plainly untenable and we think need not be dis-

cussed at length. The ordinance is not discriminatory and no effort was made in the Court below or here to show that it is unduly burdensome. In this connection see Grosjean vs. American Press Co., 297 U. S. 233, 56 S. Ct. 444.

Thus we find no violation of the First Amendment (or the Fourteenth) to the Federal Constitution in the application of the ordinance to appellant and his book selling. It is not, in our opinion, unconstitutional as so applied.

In appellant's extensive brief (eighty-four pages, exclusive of index and table of authorities cited) questions are argued which are based upon provisions of the South Carolina Constitution (of 1895) of similar import to those of the Federal Constitution which have been discussed. However, only the latter were relied upon in the trial Court and are, therefore, properly raised here. What we have said, we think, rightly disposes of appellant's contentions with respect to them.

The exceptions are overruled and the judgment of the Circuit Court affirmed.

Baker and Fishburne, JJ., and T. S. Sease and E. H. Henderson, Circuit Judges, AAJ., concur.

[fol. 25] In Supreme Court of South Carolina

[Title omitted]

Petition for Appeal, Statement, Assignments of Error and Prayer for Reversal

Petition for Appeal

Being aggrieved by the final decision of the Supreme Court of South Carolina, and the judgments of the courts below, in the above entitled cause, appellant herein prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

Statement

In this case the validity of an ordinance of the Town of McCormick, South Carolina is called in question as being unconstitutionally construed and applied to the facts and

circumstances of this case. The ordinance in question reads:

> "Be It Ordained by the Town Council of the town of McCormick in council assembled, and by the authority of the same.
>
> "Section—That the following license on business [fol. 26] occupation or professions within the corporate limits of the Town of McCormick, South Carolina:
>
> "Agents, selling books, per day $1.00, per year $15.00."

This ordinance was duly and properly passed by Town Council of McCormick, South Carolina. The ordinance is here drawn in question upon the ground that said ordinance as construed and applied by the courts of South Carolina, is repugnant to the First and Fourteenth Amendments to the United States Constitution.

The Supreme Court of South Carolina is the highest court in South Carolina to which an appeal could be taken under the provisions of the South Carolina law, and by its own statement it is the "court of last resort" in this case in South Carolina. The decision by the Supreme Court of South Carolina is in favor of the validity of the said ordinance. Therefore, in accordance with the rules of the Supreme Court of the United States (Rule 46, paragraph 2 [28 U. S. C. s. 354]), appellant respectfully shows this Court that the case is one in which under the legislation in force when the Act of January 31, 1928 (45 Stat. L. 54) was passed, to wit, under Section 237 (a) of the Judicial Code [28 U. S. C. s. 344], a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

This cause came before the Supreme Court of South [fol. 27] Carolina on appeal from the McCormick County Court of General Sessions. The case originated in the Mayor's Court of the Town of McCormick, where appellant was tried before a jury. Appellant insisted in the trial court by motions duly and properly filed, that the judgment of conviction was erroneous and invalid for the following reasons: (1) that the activity complained of did not in any proper sense come within the terms of the ordinance which purported to tax "agents selling books" and (2) that if the ordinance was thus construed and applied to his activity it infringed and violated his rights of freedom of worship,

freedom of speech and freedom of press secured to him under the First and Fourteenth Amendments to the Constitution of the United States. The objections raised in the Circuit Court were the same and were reiterated finally in the Supreme Court of South Carolina, where his conviction for failure to pay the occupational tax in question was affirmed.

The Supreme Court of South Carolina rendered its opinion in this case on August 26, 1943, which opinion and judgment immediately became final. The opinion of the Supreme Court of South Carolina appears in the Record in its entirety.

Assignment of Error

Now comes appellant in the above entitled cause and files herewith, together with said petition for appeal, this assign-
[fol. 28] ment of error, and says that this is error committed by the courts below in the record and proceedings of the above entitled cause, and for the purpose of having same reviewed by the United States Supreme Court, makes the following assignment:

The Supreme Court of South Carolina erred in affirming the judgment of conviction against appellant because the ordinance in question is unconstitutional as construed and applied to appellant's activity because it abridges and burdens appellant's exercise of the rights of freedom of speech and press and freedom to worship Almighty God as His minister preaching from house to house, contrary to the First and Fourteenth Amendments to the United States Constitution.

Prayer for Reversal

For and on account of the above errors, appellant prays that the said judgment of the Supreme Court of South Carolina hereinabove described and entitled, be reviewed by the Supreme Court of the United States and reversed with a judgment rendered in favor of appellant allowing costs.

Grover C. Powell, by Hayden C. Covington, Attorneys for Appellant.

[fol. 29] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

ORDER ALLOWING APPEAL—October 15, 1943

Appellant in the above entitled suit and cause has prayed for allowance of an appeal in this suit and cause to the Supreme Court of the United States from the judgment made and entered by the Supreme Court of South Carolina on the 26th day of August, 1943, overruling appellant's bill of exceptions tendered as to the complaint filed and subsequent proceedings had thereunder in the Mayor's Court of the Town of McCormick, and the McCormick County Court of General Sessions under the ordinance of the town of McCormick drawn in question in said cause there titled, to wit, Town of McCormick, South Carolina v. Lester Follett.

It appearing that the appellant in his bill of exceptions and in said cause before argument attacked the ordinance in question on the grounds, as contended by appellant, that it unreasonably abridges freedom of speech, freedom of press and freedom to worship Almighty God as His min-
[fol. 30] ister, contrary to the First and Fourteenth Amendments to the federal constitution, which contention was overruled by the decision and judgment of the said Supreme Court of South Carolina previously rendered herein; and,

It appearing that appellant has presented and filed a petition for appeal to the Supreme Court of the United States, a statement, assignments of error and prayer for reversal and jurisdictional statement, all within three (3) months from date that said judgment of the Supreme Court of South Carolina became final, viz., August 26, 1943, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It Is Now Here Ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the judgment of the Supreme Court of South Carolina, and the said judgment of the McCormick County Court of General Sessions and the said judgment of the Mayor's Court of the Town of McCormick, South Carolina, in aforesaid cause as pertains to the conviction under the complaint filed under the ordinance of the town of McCormick here in question, as provided by law; and

It Is Further Ordered that the Clerk of the Supreme Court of South Carolina shall prepare and certify to the transcript of the record, proceedings and judgment in the said cause and transmit the same to the Clerk of the Su-
[fol. 31] preme Court of the United States together with all exhibits in original form as designated by praecipe filed with him, so that he shall have the same in said Court within twenty (20) days from date.

And It It Further Ordered that security for costs on appeal be fixed in the sum of Five Hundred ($500.00) Dollars and appellant having presented an undertaking in the sum of Five Hundred ($500.00) Dollars executed by the National Surety Corporation, it is further ordered that such undertaking be and the same is hereby approved and ordered filed.

Dated, October 15, 1943.

D. Gordon Baker, Senior Active Asspciate Justice, Acting Chief Justice Supreme Court of the State of South Carolina.

[fol. 32] Citation in usual form omitted in printing.

[fols. 33-34] Cost Bond on Appeal for $500.00 approved Oct. 15, 1943, omitted in printing.

[fols. 35-37] In Supreme Court of South Carolina

[Title omitted]

[fol. 38] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 39] United States Supreme Court

[Title omitted]

Statement of Point To Be Relied Upon—Filed November 15, 1943

Comes now the appellant in the above-entitled cause and states that the point upon which he intends to rely in the

Supreme Court of the United States in this cause is as follows:

The ordinance is unconstitutional as construed and applied to appellant's activity because it abridges and burdens appellant's exercise of the rights of freedom of speech and press and freedom to worship Almighty God as His minister preaching from house to house, contrary to the First and Fourteenth Amendments to the United States Constitution.

Grover C. Powell, Hayden C. Covington, by Hayden C. Covington, Attorneys for Appellant.

[fol. 40] UNITED STATES SUPREME COURT

[Title omitted]

DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed Nov. 29, 1943

To the Clerk of the Supreme Court of the United States:

You will please print each of the documents designated below, contained in the record of the above captioned case now on file with your office, forwarded to you by the Clerk of the Supreme Court of South Carolina, to wit:

1. Opinion of the Supreme Court of South Carolina.
2. Transcript of record before the Supreme Court of South Carolina.
3. Petition for appeal, assignment of errors, and prayer for reversal.
4. Order allowing appeal.
5. Citation.

Dated, November 27, 1943.

Hayden C. Covington, Attorney for Appellant.

[fol. 41] PROOF OF SERVICE:

STATE OF NEW YORK,
County of Kings, ss:

Hayden C. Covington, being duly sworn, says that he is attorney for appellant in the above entitled cause; that he served a copy of the within Designation of Parts of the

Record to be Printed upon counsel for appellee by depositing said copy, securely enclosed in a sealed wrapper addressed to the City Attorney, McCormick, South Carolina, and with postage fully prepaid therefor, in a United States Post Office in the City of New York on the date hereinafter written.

Hayden C. Covington.

Sworn to and subscribed before me this 27th day of November, 1943.

William K. Jackson, Notary Public, Kings County. Kings Co. Clk's No. 119, Reg. No. 62-J-5. Commission expires March 30, 1945. (Seal.)

[fol. 42] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—December 13, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on cover: File No. 47,979, South Carolina, Supreme Court. Term No. 486. Lester Follett, Appellant, vs. Town of McCormick, South Carolina. Filed November 15, 1943. Term No. 486, O. T. 1943.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 486

LESTER FOLLETT,

Appellant,

vs.

TOWN OF McCORMICK, SOUTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

STATEMENT AS TO JURISDICTION.

GROVER POWELL,
HAYDEN C. COVINGTON,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 486

LESTER FOLLETT,

Appellant,

vs.

TOWN OF McCORMICK, SOUTH CAROLINA,

Appellee.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 (1) of the Rules of the Supreme Court of the United States, as amended April 6, 1942, appellant files a *statement as to jurisdiction* disclosing the basis upon which it is contended that the Supreme Court has jurisdiction upon appeal to review the judgment in question.

Statutory Provisions Sustaining Jurisdiction.

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial Code [28 U. S. C. 344 (a)].

Under Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error.

South Carolina Legislation Questioned.

In this case the validity of a certain ordinance of the Town of McCormick, South Carolina, is called into question as being unconstitutionally construed and applied to the facts and circumstances of this case. The questioned ordinance reads:

> "BE IT ORDAINED by the Town Council of the town of McCormick in council assembled, and by the authority of the same:
>
> "SECTION—. That the following license on business, occupation and professions to be paid by the person or persons carrying on or engaged in such business, occupation or professions within the corporate limits of the Town of McCormick, South Carolina:
>
> "Agents selling books, per day $1.00, per year $15.00."

Timeliness.

The Supreme Court of South Carolina, the highest court in the State of South Carolina to which an appeal could be taken in this case, entered its judgment and opinion on August 26, 1943. (See the entire opinion and judgment attached hereto as Appendix.) The petition for appeal and other papers required by the rules of this Court are filed within three months from the date such judgment became final, and hence this appeal is timely made.

Opinions.

The opinion of the Supreme Court of South Carolina is attached hereto as Appendix to this statement.

Statement of Nature of the Case and Rulings of Court Bringing Case Within Jurisdiction Provisions Relied Upon.

The appellant was charged by complaint with a violation of the ordinance of the Town of McCormick hereinbefore mentioned. He was brought to trial before a jury on March 21, 1942 in the Mayor's Court of the said Town of McCormick. He was found guilty and sentenced to pay a fine of Fifty Dollars or serve twenty days in jail (R. 9 fol. 37). He appealed from this judgment and sentence and his case was thereafter heard in the McCormick County Court of General Sessions. On November 2, 1942, the County Court affirmed the conviction (R. 9-17). Appellant timely filed his appeal to the Supreme Court of South Carolina, and by way of a Bill of Exceptions raised objections to this judgment on the grounds that it was in violation of the First and Fourteenth Amendments to the Federal Constitution in that it deprived him of the free enjoyment of his rights of freedom of speech, freedom of press, and freedom to worship ALMIGHTY GOD as His minister. The Supreme Court of South Carolina considered these objections and placed its construction on the constitutional provisions in question, under which appellant's conviction was affirmed (R.—).

Statement of Facts.

The evidence in the trial court was for the most part in accord and not in dispute. It appears that appellant was and is an ordained minister of the gospel, working under the direction of the Watchtower Bible and Tract Society, Inc., of Brooklyn, New York, as one of Jehovah's witnesses. This Society, as the record in the Supreme Court of South Carolina showed, is a charitable corporation organized under the membership corporations law of New York, and is incorporated to publish Bibles and Bible litera-

ture, and to appoint, ordain and maintain ministers of the gospel (R. 1, fol. 7; R. 2, fol. 9, 12; R. 3).

The appellant, at the time of his arrest, was distributing literature dealing with Biblical subjects published by the aforementioned Society in the manner prescribed by that organization for the dissemination of the gospel message. This distribution of Bible literature was only an incidental part of his ministerial duties (R. 1, fol 8; 6, fol. 27).

A witness in the trial court testified that she gave appellant twenty-five cents, and he left with her a clothbound book of 384 pages, entitled *Children*, a book devoted to an explanation of Bible history and prophecy (R. I, fol. 8). Appellant contended that he explained to this witness at the time she gave him the money that the twenty-five cents was regarded as a contribution which would be used to defray the cost of printing more books of like kind to be used in teaching God's Word to others (R. 2, fol. 9). It was established that appellant was calling on all of the residents of the Town of McCormick, offering to leave this book with them if they cared to read it (R. 6, fol. 28).

The evidence shows that appellant distributed this literature by calling upon the people at their homes and offering to leave the book with them if they cared to read it. Always the householder was given the opportunity to make a small contribution as did the witness just mentioned, for the purpose of aiding to print other like literature. If the person did not have any money, but expressed a desire to have the book and read the same, it was left without additional or any contribution. Appellant said that he carried with him in this work a certificate of ordination issued by the Watchtower Bible and Tract Society identifying him as an authorized representative of said Society and establishing his status as an ordained minister. This certificate

appears in the Record at pages 2 to 4. This certificate reads in part:

> "This is to certify that Lester Follette whose signature appears below, is an ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus and that said person is one of Jehovah's witnesses. The Watch Tower Bible and Tract Society, created and organized by law to preach the gospel of God's Kingdom, sends forth Jehovah's witness to do this work as commanded by the Almighty God. Jehovah's witnesses are ordained and commissioned by God, and the signer of this card Scripturally claims such ordination and commission, as set forth in the Bible at Isaiah 43:9-12; Matt. 10:7-12; Matt. 24:14; Acts 20:20; 1 Peter 2:21; 1 Cor. 9:16. Being one of Jehovah's witnesses, in obedience to God's commandments, preach the gospel and worship Almighty God by calling upon people at their homes, exhibiting to them the message of the gospel of said Kingdom in printed form. Bibles, books, booklets, and magazines are offered free to those that are poor, or on contribution, which contribution is accepted for the publishing of other literature so that the Word of the Lord may have greater circulation in all this world for a witness, giving other people the opportunity of learning of God's gracious provision for them. Said witness of Jehovah is doing this work of his own volition and is bearing the testimony before the people in accordance with the fundamental laws of this land and in obedience to God's commandment, which is supreme. • • •
>
> "Watchtower Bible and Tract Society.
> "By: N. H. Knorr, *President*.
>
> "Lester Follette, McCormick, South Carolina."

Appellant was a resident of the town of McCormick. He did not obtain the license required for peddling as the police insisted he must for the reason, as he contended, that he was

not a peddler, salesman, or hawker of anything, but that he was an ordained minister of the gospel engaged in the charitable and Christian activity of carrying God's Word to the people (R. 6, fols. 27, 28, 29).

Grounds and Decisions Sustaining the Jurisdiction and Showing That Substantial Federal Questions Are Involved.

The ordinance is unconstitutional as construed and applied to appellant's activity because it abridges and burdens appellant's exercise of the rights of freedom of speech and press and freedom to worship ALMIGHTY GOD *as His minister preaching from house to house, contrary to the First and Fourteenth Amendments to the United States Constitution.*

Murdock v. *Pennsylvania*, 319 U. S. —, 63 S. Ct. 870;
Jones v. *Opelika*, 319 U. S. —, 63 S. Ct. 890;
Martin v. *Struthers*, 319 U. S. —, 63 S. Ct. 862;
Largent v. *Texas*, 318 U. S. 418;
Jamison v. *Texas*, 318 U. S. 413;
State v. *Meredith*, 197 S. C. 351, 15 S. E. 2d 678.

Discussion of Law in Question and of Federal Questions Presented On This Appeal.

The Record in this case is identical in every material respect to that presented to this Court in the case of *Murdock* v. *Commonwealth of Pennsylvania*, decided May 3, 1943, cited as 319 U. S. —, 63 S. Ct. 870. This case presents no new issue that was not presented and decided in the *Murdock* case. Here again the single question is involved: "Does the exaction of a peddler's occupational license tax, when applied to the work of Jehovah's witnesses preaching the gospel from door to door by distribution of books containing printed Bible sermons, violate the First and Four-

teenth Amendments to the Federal Constitution?" In the *Murdock* case this Court answered that question in the affirmative. The court below in the instant case has answered it in the negative, directly overruling and avoiding the principles of law set down by this Court, saying "It seems, and is, a very far cry from the import of the foregoing clause [of the First Amendment] to the occupational license ordinance in question."

The learned court below after sympathetically reviewing the holding of this Court in the original decision made in the case of *Jones* v. *Opelika*, 316 U. S. 584, observes that this Court "'went up the hill and down again'" when it vacated the rule laid down in the *Jones* case and acted to "restore to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith through the distribution of literature." Then, conceding that this Court's opinion and judgment is "controlling upon us", the court below then avers: "The facts of the *Murdock* case are materially unlike those of appellant's. * * * we think the sales proven were more commercial than religious. The license was required for the selling of books, not for the spreading of religion."

This holding, however, is but a mere parody of the holding of this Court in the reversed and vacated opinion of *Jones* v. *Opelika*, *supra*, wherein it was said: "But it is because we view these sales as partaking more of a commercial than religious or educational transactions that we find the ordinances, as here presented, valid. A tax on religion or a tax on interstate commerce may alike be forbidden by the Constitution. It does not follow that licenses for selling Bibles * * * must fall."

A close examination of the records in the *Jones*, *Murdock*, and other cases decided by this Court at the same time, reveals that work being done by those petitioners was in

every respect exactly similar to the appellant's activity here. The presumption indulged by the court below that all the petitioners were "itinerant" in the *Murdock* cases is not justified by the facts in those cases. Therefore when this Court reversed its first holding in the *Jones* case, holding that the work of Jehovah's witnesses was not "commercial" but was a "religious venture", that opinion swept away completely the argument now advanced by the court below. Consider these trite words of Mr. Justice Douglas in the *Murdock* case:

> "But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. * * * It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist, however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."

This, we submit, disposes of the view taken of the appellant's work by the Court below. If sustained, then this judgment would give the courts the power to examine each individual clergyman within their jurisdiction who might be brought before them as was the appellant here, for the purpose of ascertaining and deciding whether his preaching work was done for commercial or religious purposes.

Apparently the court below has already decided that ministers, evangelists and preachers who are residents of towns and who earn their living by preaching the gospel to the people are engaged in a taxable commercial activity. Thus, as suggested by this Court, every minister who allows

a collection plate to be passed in his church, at once becomes liable, under this judgment, for the payment of the peddler's license tax. Also, as observed by the Supreme Court of Louisiana in the case of *Shreveport* v. *Teague*, 200 La. 679, 8 S. 2d 640:

> "The fact that relator, as an incident to his preachings, attempts to sell literature which is conformable with his religious beliefs does not alter the nature of his profession or make him a solicitor, hawker or itinerant merchant. * * * To hold otherwise we would be compelled to attribute to the City Council of Shreveport the intention of declaring that the visitation into homes (without previous invitations) by priests and ministers of all religious denominations, accompanied by the sale of Biblical literature constitutes a nuisance and a misdemeanor. This we will not do."

Merely because the court below in this case did not manifest that compunction shown by the Louisiana court, is no reason why this Court should not do as it has been called upon to do in many other cases—set aside the conviction and protect the constitutional right, which is otherwise infringed upon and destroyed beneath the burden of governmental taxation.

The court below has decided that ministers in South Carolina enjoy a "complete freedom of religion", but then holds that this freedom does not allow a minister devoting his full time to preaching the gospel in his chosen way, that is by the distribution of printed Bible sermons in book form, to avoid the payment of "the moderate license of $15.00 per year prescribed by the ordinance under attack". This conclusion is reached in spite of the court's finding that the book CHILDREN distributed by appellant is a "religious book" and that its "publication and distribution come within the meaning of the words, 'exercise of religion', as they are used in the constitution." Thus

the situation is that the Supreme Court of South Carolina has sustained a flat occupational tax applied to the most cherished "privilege granted by the Bill of Rights". In direct contradiction to the legality of such a holding, the majority of this Court said in the *Murdock* case:

> "A state may not impose a charge for the enjoyment of a right granted by the federal constitution. • • • A license tax applied to the activities guaranteed by the First Amendment would have the same destructive effect. • • • The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down." [Citing cases.]

The court below seeks to distinguish the *Murdock* case from the one at bar by saying that this Court "had in contemplation an itinerant preacher" but this case "does not involve an itinerant". Note that the learned court does not, as indeed it cannot, hold that appellant was not a minister and a preacher. The whole basis of the opinion is that the *Murdock* opinion includes only those nomadic persons who travel from town to town without ever acquiring and caring for a congregation in a fixed location, and that the *Murdock* decision excludes from the protection of the First Amendment local clergymen and pastors. It is unnecessary to go into any detail as to the definition of the terms involved to show the fallacy of such an arbitrary and discriminatory classification. Indeed if such a distinction were observed, then it must fall under the specific terms of the "equal protection" clause of the fourteenth amendment.

The sophistry of such a distinction would immediately lead to an endless maze of hairline situations. When does a minister cease to become an itinerant and subject to a tax of a town where he might be distributing his books and tracts? Will he be allowed to call on each person in the

town once? or twice? or three times? In a city the size of New York he could make more than seven and a half million calls without ever calling on the same person twice. Would he be exempt from such taxation as here involved even though it took him a lifetime to make all these calls? How much of the local clergyman's activity is "religious" and how much is "commercial"? And so forth *ad infinitum*. The answer these impossible propositions deserve is that no such arbitrary distinction can exist under the broad provisions of the First Amendment. A nomadic evangelist has no more right under the constitution to protection from municipal taxation than does a resident clergyman.

We submit that this Court has construed the First Amendment to protect the distribution of just such literature as is here involved, from the confiscatory and burdensome license tax sought to be imposed upon appellant's activity. Just as was said in the *Murdock* case:

> "The hand distribution of religious tracts is an age-old form of missionary evangelism. • • • This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press."

This makes it clear then, that the basis upon which the *Murdock* case rested was the protection of the cherished constitutional right to distribute religious literature free from the burden of taxation, rather than protection of only a certain group of nomadic evangelists.

In passing, it is noteworthy to observe that the Supreme Court of South Carolina overruled its own precedent established in July of 1941, in the case of *State* v. *Meredith*, 197 S. C. 351. This Court in the *Murdock* opinion cited this

very case as authority for the proposition that the activity of Jehovah's witnesses in distributing literature did not constitute a commercial rather than a "religious" venture. This Court agreed with the finding and conclusion of the South Carolina Supreme Court that:

> "• • • the 'sale' of the book by defendant was merely collateral to the main purpose in which he was engaged, which was to preach and teach the tenets of his religion."

In the *Meredith* case the court below says that it found no "profit motive" involved, but here there was such a motive, and it was that motive that sustained the application of the tax. The court below hangs this proposition on the only peg left sticking out of the *Murdock* opinion wherein it was said: "Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital."

For the purposes of argument, let it be assumed that the finding of the court below was not (as it actually is) a "distortion of the facts of record" in holding that the activity of appellant was commercial rather than "religious". Appellant vigorously contends that in spite of such a view of his activity, he is still within the protection afforded by the First Amendment to the institutions of freedoom of speech and freedom of press.

The reason is both manifest and elementary. The fundamental rule is stated in the *Murdock* opinion: "*A state may not impose a charge for the enjoyment of a right guaranteed by the federal constitution.*"

One of the greatest industries in the world is the newspaper and magazine industry. In every community of the land, the people are informed on every conceivable matter of public concern. Only a tiny fraction of this great in-

dustry is done because of benevolent or charitable reasons. For the most part the *profit motive* is the basic inspiration of the industry. Yet no one would assert that this great industry because of that fact was not in the fullest sense exercising its right of "freedom of the press". Thus the use of the word "press" in the federal constitution necessarily means and includes not only the "religious presses" or the "charitable presses" but the term "freedom of the press" embraces *all* of the the public press. WHY?

By the fundamental document called the "Constitution of the United States" THE PEOPLE secured to themselves certain rights which have been termed *inalienable rights.* The benefit which ultimately accrues to the people is the real "freedom" protected by the First and Fourteenth Amendments. The founding fathers of this country envisioned that every person should have not only right of freedom of press, but the right of *freedom to read;* not only the right of freedom of speech, but the right of *freedom to listen;* not only the right of freedom to worship God as His minister, but the *right to have God's Word explained to him.* Only when the freedoms are thus viewed do they have any real meaning at all.

Thus, the freedoms in the First Amendment cannot be measured by the character of the moving parties involved. In each case the real test is the consideration and determination whether or not the article or service delivered to the people of the United States falls into any one of the categories specified by the constitution. If the article or service is found to be one of those things which the PEOPLE have secured unto themselves by the constitution, then such article or service is beyond the reach of the federal or state governments' control up to the point where the police power necessitates interference.

When this common-sense view is taken of the First Amendment, and aside from all the many supporting

precedents announced by this Court, it will be found that regardless of the fact that many presses or as the fact of the matter is, *most* presses turn out the printed page primarily for the profit that will be derived therefrom, still the PEOPLE are protected in their right to receive the benefits of the printed page. Suppose that appellant here was motivated solely by the most selfish of desires for personal enrichment in distributing the book CHILDREN to the people. Assume further that the book contained information of the most vital and important character for the public benefit. Could it possibly be contended that the municipality by way of burdensome taxation upon the appellant's "commercial" distribution of the religious book, could constitutionally deprive the people of their right to have this information? If a householder wants the information contained in a book, what difference could it possibly make to him that the person bringing it to him is inspired by commercial rather than religious motives? As far as the constitutionally protected benefit to the people is concerned, what difference does it make that the transaction partakes more of a "commercial than religious or educational transactions"? The compelling answer is NONE!

The same rules would apply to the freedom of speech. Can a municipality levy a flat tax upon the occupation of persons making political speeches because they do so to earn money rather than to benevolently educate the people? Can such a tax be levied upon a preacher because he preaches to provide his own living rather than for the benefit of his congregation's souls? No court would sanction such an arbitrary and factitious basis for the levy of the tax.

When the State of Louisiana levied a two per cent tax upon the gross receipts of newspapers taking commercial advertising, this Court in the case of *Grosjean* v. *American*

Press Company, 297 U. S. 233, held that the tax was unconstitutional for the reason that the tax:

> "• • • operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising; and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid (*Magnano Co.* v. *Hamilton*, 292 U. S. 40, 45, and cases cited), it might well result in destroying both advertising and circulation."

This case is directly in point here if the finding of fact made by the South Carolina Supreme Court is correct and the work of appellant was commercial rather than "religious"; and this *Grosjean* case cannot be avoided.

As a further consideration it will be observed that if a license tax can be applied to the activity questioned, then the municipality has the correlative right to censor and license, control and suppress such activity without encountering any constitutional difficulty. This Court in the cases of *Lovell* v. *Griffin*, 303 U. S. 444, *Schneider* v. *State*, 308 U. S. 147, *Cantwell* v. *Connecticut*, 310 U. S. 296, *Jamison* v. *Texas*, 318 U. S. 413, and *Largent* v. *Texas*, 318 U. S. 418, has struck down the evil of "administrative censorship" of "religious publications". It is interesting to note that the *Schneider*, *Jamison* and *Murdock* cases all specifically disclaim having any effect on "commercial" solicitation or distribution, which might be taken as an indication that had it been determined that the publications in question were not "religious" then the ordinances in each instance would have been held constitutional as in the case of *Valentine* v. *Chrestensen*, 316 U. S. 52.

Appellant respectfully contends that the freedoms secured to the people under the First and Fourteenth Amendments are too precious and fundamental to the success of democracy to be based on such a shallow foundation as would

allow them to exist only where they do not partake of any "commercial" characteristics. There are almost no undertakings or ventures that do not in some way "partake of commercial characteristics". "Records of fact" are too easily distorted by courts and juries, and if this judgment is allowed to stand together with the previous pronouncements of this Court to like effect, then a way has been found to censor, license and suppress the public press. It is high time for this Court to declare finally and forcefully that the institutions of freedom of press and freedom of speech belong to the people, FREE from any burdens of previous restraints such as censorship or taxation, and that these freedoms are not to be chiseled away and watered-down just because commercialists make use of them. No logical reason can exist why a newspaper must be subject to municipal censorship ordinances or tax ordinances just because it carries a commercial advertisement or even if it is one hundred per cent advertisement and each copy is sold for a profit. If it carries matter of public concern and interest, and does not transcend the limits which must be drawn under the police power, then it is equally entitled to the protection of the First Amendment along with a clergyman's Sunday morning sermon.

It is sufficient for the purposes of this Statement merely to list a few of the cases decided by this Court which will substantiate appellant's contention in this behalf:

California v. *Central Pac. R. Co.*, 127 U. S. 1;
Collector v. *Day*, 11 Wall. 113;
McCulloch v. *Maryland*, 4 Wheat. 316.

Summarizing, appellant's contention is that this case is factually the same as the *Murdock* case and should be disposed of on the basis of that judgment. However, if it is found that the Supreme Court of South Carolina is right, and this case falls within the exception announced in the

Murdock case allowing the application of license taxes upon commercial distribution of literature, then it is still the duty of this Court to note jurisdiction in the case for the reason that such holding is a misconstruction of the First and Fourteenth Amendments to the Federal Constitution.

Conclusion.

For sake of brevity, reference is here made to the Petition for Appeal filed in this cause, with which we incorporate by such reference, each and every assignment of error therein contained and hereby make the same a part hereof to show that substantial federal questions were presented before the Supreme Court of South Carolina.

WHEREFORE, the Supreme Court of the United States should note jurisdiction of this cause for final hearing in accordance with the rules of the Court, because the courts below disposed of important and substantial federal questions in a way that is in conflict with applicable decisions of this Court and have so radically and far departed from the Constitution of the United States and the accepted sound course of judicial procedure as to call for this Court's power of supervision and review to halt the same.

Respectfully submitted,

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APPENDIX.

SUPREME COURT OF SOUTH CAROLINA.

TOWN OF McCORMICK, *Respondent*,

v.

LESTER FOLLETT, *Appellant*.

Case No. 2415.

Opinion No. 15573.

Filed August 26, 1943.

Affirmed.

Grover C. Powell, of Atlanta, Georgia, and C. E. Cooley, of Anderson, for appellant.

J. Fred Buzhardt, of McCormick, and Solicitor Jeff D. Griffith, of Saluda, for respondent.

STUKES, A. J.:

Appellant was convicted in the Mayor's Court of the Town of McCormick and sentenced to pay a fine of $50.00 or be confined in jail for twenty days for violation of a municipal ordinance prescribing an occupational license tax. The classification in which he fell is as follows: "Agents selling books, per day $1.00, per year $15.00."

The instances of violation to which the evidence referred were of the sales of a cloth-bound book entitled "Children" and containing three hundred and sixty-eight pages of text with an elaborate index, purporting to be an edition of three million copies, which cost the purchasers twenty-five cents each, but appellant contended that such price was a contribution. However, he admitted in testimony that he had no other income, living upon the profits of his sales or "contributions", and remitted to the publisher for the books after he disposed of them. The record indicates that he distributed other literature published by the Watch Tower Bible and Tract Society, Inc., of Brooklyn, New York, but the prosecution and conviction involved the

book mentioned, "Children", and only it was given this Court as an exhibit on the argument of the case.

After conviction and sentence, defendant appealed to the Circuit Court of General Sessions upon the ground that the prosecution should have been dismissed because the ordinance as here applied is in violation of the Fourteenth Amendment of the Federal Constitution (extending against the States the prohibitions of the Bill of Rights, the first eight amendments,) in that it restricts freedom of speech, freedom of press and freedom of worship. It was also urged at the trial that there was insufficient testimony of an actual sale or sales of the books within the corporate limits of the Town of McCormick, but that ground was abandoned upon appeal to the Circuit Court. It may be said, however, that the conviction was upon trial by jury and they had ample evidence before them to sustain their finding of sales.

The appeal came before the Honorable E. C. Dennis, presiding Judge, who heard the arguments thereon and took them under advisement for considerable time, afterward filing his order dated November 2, 1942, in which he sustained the conviction. The order is interesting and demonstrates his close study of the record and general careful consideration of the case. From it appellant has brought his appeal to this, the Court of last resort of this State.

We agree with the trial Judge in his observation that our decision of *State* v. *Meredith*, 197 S. C. 351, 15 S. E. 2d 678, is not apposite. There it was found that the defendant was an itinerant minister of Jehovah's Witnesses and the sale by him of a book (apparently a different one from that here involved) in a rural community "was merely collateral to the main purpose in which he was engaged, which was to preach and teach the tenets of his religion", with no profit motive involved. The statute there invoked (the state hawkers and peddlers license law) was properly held inapplicable and the decision of constitutional questions was expressly avoided.

Here the appellant contended in evidence and argument that he is an ordained minister of the same sect and he

introduced in evidence a certificate of such of the Watch Tower Bible and Tract Society, but there is no doubt of the fact, established in evidence, that he earns his living by sale of books, having no other occupation. This clearly takes him out of the rule of *State* v. *Meredith*. It will hardly be contended that any other minister may make his living by the sale of books and, should he engage in his occupation in the Town of McCormick, not be subject to the moderate license of $15.00 per year prescribed by the ordinance under attack.

It may be conceded that the book in question is a religious book. Tested by the tenets of other forms of the Christian religion with which we are familiar, it is full of heresies. But it purports to offer a plan of salvation of the human soul in life after death, based upon quotations from the Bible, so we conclude without difficulty that its publication and distribution come within the meaning of the words, "exercise of religion", as they are used in the constitution. Appellant's sect undertakes to make a now unimportant and obscure distinction between religion and Christianity, and on the back of his certificate of ordination, in evidence, is the following statement with reference to the book: "It is not religious, but fills the sincere heart with contentment and hope. It is not a child's book, but is for adults and children as well. Here is a copy for you, and you may contribute twenty-five cents to help publish more like books. Read CHILDREN, rejoice and live."

It is interesting to note that the able and long-experienced Judge who heard the case on circuit sat as an Acting Associate Justice of this Court in *State* v. *Langston*, 195 S. C. 190, 11 S. E. 2d 1, a case affirming the conviction of other Jehovah's Witnesses of breaches of the peace. In his opinion for the Court he said: "In this State there are so many religious beliefs, so varied in what they teach and with such great differences, that one of the most fruitful, and yet fruitless, sources of argument is some theological question. It certainly cannot be said that there is not in this State an absolute freedom of religion."

For convenient reference, the portion of the first amendment of the Federal Constitution, urged in opposition to the municipal ordinance under review, is here set out:

> "Congress (or a State or subdivision thereof—interpolated) shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or abridging the freedom of speech, or of the press. • • •"

It seems, and is, a very far cry from the import of the foregoing clause to the occupational license ordinance in question. Does application of the latter to appellant's sale of religious books violate the constitution? Answering similar questions has troubled other Courts. In 141 A. L. R., beginning at page 538, is an enlightening annotation upon the subject following report of the five to four decision in *Jones* v. *Opelika*, and other cases, 316 U. S. 584, 62 S. Ct. 1231, 86 L. Ed. 1174, 141 A. L. R. 514. The following excerpts (pages 540 and 542) from the editorial comment found in the annotation appear to be a fair summary of the decided cases upon the subject up to that time:

> "The effect of the cases, taking them as a whole, seems to be that the sale, and also, presumably, the distribution without charge, of books and pamphlets dealing with religious subjects may be reasonably regulated as to time, place, and manner, without there being any invasion of religious freedom as protected by Federal and State Constitutions. Furthermore, transactions of sale and solicitation of sale of such literature may be subjected to reasonable and non-discriminatory taxation."
>
> "In nearly every case wherein the question has been presented, the view has been taken that a reasonable nondiscriminatory license tax imposed upon the sale of religious literature from door to door is not invalid as an invasion of religious liberty guaranteed by constitutional provisions."

But the Supreme Court of the United States "went up the hill and down again" in its decision of *Jones* v. *Opelika*,

supra, and vacated it in another equally closely divided decision. This action was coincidental with its decision of *Murdock* v. *Pennsylvania* and seven other cases, 63 S. Ct. 870, (advance sheet No. 13, May 15, 1943), also by five to four. Does this last decision of that high Court, whose view is of course controlling upon the question involved, indicate reversal of the conviction and sentence of appellant? After most careful consideration, we do not think so. The facts of the Murdock case are materially unlike those of appellant's, although they appear to be members of the same religious sect. In view of what has been said of the case at bar it would perhaps be sufficient to point out that in the leading opinion in Murdock's case it was clearly said: "The cases present a single issue—the constitutionality of an ordinance which as construed and applied required religious colporteurs to pay a license tax as a condition to the pursuit of their activities." 63 S. Ct. at page 873. On the contrary, in the case at hand, we have the conviction of a resident of a town, the ordinance of which is involved, who earned his living by the sale of books and did so within the town without obtaining the required license, which latter would have cost him $1.00 per day or $15.00 per year. He was literally "selling books," the words of the ordinance.

The Supreme Court in its majority opinion in *Murdock* had in contemplation an itinerant preacher, and expressly referred to such, but this case, so far as the record discloses, does not involve an itinerant. The dictionary definition, and the commonly accepted meaning, of an "itinerant" is one who travels from place to place. However, the appellant was selling books in the town of his residence. "Itinerant", used as an adjective by the Supreme Court, means: "Passing or traveling about the country; going or preaching on a circuit; wandering." Webster's New International Dictionary, Second Edition, Unabridged, G. & C. Merriman Company, 1939. It is certainly not a distortion of the facts (see 63 S. Ct. at page 874) in this case to find, which we do, and hold, as did the lower Courts, that appel-

lant's occupation was that of selling books and not that of colporteur.

Furthermore, the Supreme Court based its acquittal of Murdock partly, at least, upon the ground that, quoting from 63 S. Ct. at page 876, "itinerant evangelists moving through a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable." But there is no evidence in the record as has been pointed out, that appellant was "moving through a state or from state to state." In fact, as has been said, he was convicted for the violation of an ordinance of his home town. We think it clear that the reasoning in Murdock's case is inapplicable to this for the patent reason of the differing facts.

The majority of the Court there said (63 S. Ct. at page 874): "Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital." Undoubtedly, this is such a case but we think the sales proven were more commercial than religious. The license was required for the selling of books, not for the spreading of religion.

The contentions with reference to the constitutional inhibition against abridging the freedom of speech or of the press, are plainly untenable and we think need not be discussed at length. The ordinance is not discriminatory and no effort was made in the Court below or here to show that it is unduly burdensome. In this connection see *Grosjean* v. *American Press Co.*, 297 U. S. 233, 56 S. Ct. 444.

Thus we find no violation of the First Amendment (or the Fourteenth) to the Federal Constitution in the application of the ordinance to appellant and his book selling. It is not, in our opinion, unconstitutional as so applied.

In appellant's extensive brief (eighty-four pages, exclusive of index and table of authorities cited) questions are argued which are based upon provisions of the South Carolina Constitution (of 1895) of similar import to those of the Federal Constitution which have been discussed. However, only the latter were relied upon in the trial court

and are, therefore, properly raised here. What we have said, we think, rightly disposes of appellant's contentions with respect to them.

The exceptions are overruled and the judgment of the Circuit Court affirmed.

BAKER and FISHBURNE, JJ., and T. S. SEASE and E. H. HENDERSON, Circuit Judges, AAJ., concur.

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SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. 486

■

LESTER FOLLETT, *Appellant*

v.

TOWN OF McCORMICK, SOUTH CAROLINA

■

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

APPELLANT'S BRIEF

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SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. 486

■

LESTER FOLLETT, *Appellant*

v.

TOWN OF McCORMICK, SOUTH CAROLINA

■

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

APPELLANT'S BRIEF

Opinion Below

The opinion of the Supreme Court of South Carolina is not yet reported. It appears in the record at pages 15 to 20.

Jurisdiction

The judgment affirming conviction of appellant was entered on August 26, 1943. (R. 15, 20) On November 15, 1943, appellant duly applied for appeal to this Court. (R. 20) The application was timely granted pursuant to Section 237 (a) of the Judicial Code [28 U. S. C. 344 (a)].[1]

[1] See also Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, supporting jurisdiction of the Court.

Questions Presented

The *fundamental* question to be determined by this Court is: Does the ordinance in question on its face and as construed and applied to appellant's activity constitute an abridgment and an undue burden by taxation on the liberty of appellant to exercise his right of freedom of press and freedom to worship Almighty God as His minister of the gospel, contrary to the First and Fourteenth Amendments to the United States Constitution?

The *incidental* questions involved are:

1) Did the court below err in holding that the principles announced by this Court in *Murdock* v. *Pennsylvania*, 319 U. S. 105, were not apposite because the activity of a resident minister was involved rather than itinerant evangelists?

2) Did the court below err in holding that the activity of appellant was "commercial" and not "religious" and hence not within the protection of the First and Fourteenth Amendments to the United States Constitution, securing the freedom of press and worship?

3) Did the court below err in holding that the constitutional guaranties of freedom of the press do not extend to protect printing and dissemination of information and opinion for profit or commercially?

Ordinance Questioned

In this case the validity of a certain ordinance of the Town of McCormick, South Carolina, is called into question as being unconstitutionally construed and applied to the facts and circumstances of this case. The questioned ordinance reads:

> "BE IT ORDAINED by the Town Council of the Town of McCormick in council assembled, and by the authority of the same:
>
> "SECTION—. That the following license on business, occupation and professions to be paid by the person or persons carrying on or engaged in such business, occupation or professions within the corporate limits of the Town of McCormick, South Carolina:
>
> "Agents selling books, per day $1.00, per year $15.00."—R. 3-4.

Construction Placed on the Ordinance by the Court Below

The Supreme Court of South Carolina held that the ordinance did not relieve from payment of the occupational license tax, resident ministers of the gospel who obtained their living from the money received during the course of the distribution of "religious books". Said the court: "It will hardly be contended that any other minister may make his living by the sale of books and, should he engage in his occupation in the Town of McCormick, not be subject to the moderate license of $15.00 per year prescribed by the ordinance under attack." (R. 16) It was found that the book entitled "Children", being distributed by appellant, was a "religious book" and "so we conclude without difficulty that its publication and distribution come within the meaning of the words 'exercise of religion', as they are used in the constitution". (R. 17) But qualifying this to some extent, the court said: ". . . we think the sales proven

were more commercial than religious. The license was required for the selling of books, not for the spreading of religion." R. 19.

History and Facts Showing Questions Presented

HISTORY

The appellant was charged by complaint with a violation of the ordinance of the Town of McCormick hereinbefore mentioned. Upon his plea of "not guilty", he was brought to trial before a jury on March 21, 1942, in the Mayor's Court of the said Town of McCormick. He was found guilty and sentenced to pay a fine of fifty dollars or serve twenty days in jail. (R. 6) He appealed from this judgment and sentence and his case was thereafter heard in the McCormick County Court of General Sessions. On November 2, 1942, the County Court affirmed the conviction. (R. 12) Appellant timely filed his appeal to the Supreme Court of South Carolina and by way of a Bill of Exceptions raised objections to this judgment on the grounds that it was in violation of the First and Fourteenth Amendments to the Federal Constitution in that it deprived him of his rights of freedom of press and freedom to worship Almighty God as His minister. R. 13-14.

FACTS

Lester Follett is one of Jehovah's witnesses, and as such is a duly ordained minister of the gospel. He has consecrated his life to the publication and preaching of the gospel to mankind. (R. 1, 2) Appellant at the time in question was a resident of the Town of McCormick, South Carolina, being assigned to work there by the Watchtower Bible and Tract Society of Brooklyn, New York. (R. 2) This society, as established by the evidence, is a charitable, non-profit corporation organized under the Membership Corporations Law of the State of New York, and is incorpo-

rated to publish Bibles and Bible literature, and to appoint, ordain and maintain ministers of the gospel. R. 1, 2.

The record shows that the benevolent publishing society regularly sent appellant supplies of Bibles and Bible literature, for which he made periodic remittances. (R. 4) Among the literature thus sent was the book entitled "Children". This book was received in evidence and accompanies the Record to this Court as an original exhibit. The book contains instructions for all who would be the children and subjects of the great Lord and King, Christ Jesus. It does not purport to be a book for children only, but is for the parents and children as well. It shows how the parents can bring up the children in the right way and how the children and their parents can at all times be of mutual benefit to each other in attaining the blessings of everlasting life and happiness. The book is designed to bring joy to the people now by setting out the great truths in the Bible, which truths make the immediate future appear very bright. These truths, the book explains, are published to enable the people to understand how they may become children of the Higher Powers, Almighty God and Christ Jesus, and how they may dwell in joy under Their righteous government forever. "Children" shows that God gave His Word centuries ago that in His due time He would set up His righteous rule over the earth and that then the people would rejoice. It points out that all the Bible testimony and physical facts show that the rule of wickedness is about to come to a complete end, and that such will be followed immediately by the rule of righteousness. The book explains from the Bible how and when that government will come into full control, and what must be done by all persons who love truth and righteousness to obtain the blessings of such righteous rule. R. 3.

It appears that prior to his arrest appellant was distributing this book to the people in the Town of

McCormick by calling at their homes. (R. 2) During the course of his visits, he called at the home of Flavores Cade. (R. 1) He presented to this lady a printed card explaining the purpose of his visit. The card reads:

> "TODAY many are in perplexity as to what to do to protect and safeguard the interests of themselves and their children. The remedy for the present unhappy condition is the rule of the earth by righteous powers. God has made it possible to now learn just how and when such righteous rule will come into full control.
>
> "The great and comforting truths in the Bible are set forth in the book entitled CHILDREN. It contains instruction for all who would be children and subjects of the great Lord and King Christ Jesus. It is not religious, but fills the sincere heart with contentment and hope. It is not a child's book, but is for adults and children as well. Here is a copy for you, and you may contribute twenty-five cents to help publish more like books.
>
> "Read CHILDREN, rejoice and live." R. 3.

The witness said that she read the card, gave appellant twenty-five cents and he gave her the book "Children".

Explaining his activity in this connection, the substance of appellant's testimony appearing in the record reads:

> "My name is Lester Follett. I live in McCormick, South Carolina. I am a regular ordained minister and fully consecrated to do the will of Almighty God as set forth in the following texts: 'Ye are my witnesses, saith Jehovah, that I am God.' (Isa. 43:10-12) 'The spirit of the Lord God is upon me because the Lord hath anointed me to preach good tidings unto the meek, he hath sent me to bind up the brokenhearted, to proclaim liberty to the captives and the opening of

the prison to them that are bound, to proclaim the acceptable year of the Lord and the day of vengeance of our God, to comfort all that mourn.' (Isa. 61:1, 2) 'And this gospel of the Kingdom shall be preached in all the world for a witness unto all nations and then shall the end come.' (Matt. 24:14) As the apostles were sent forth by the Lord Jesus Christ so I am sent forth. They went from house to house preaching the gospel orally; I am doing so by going from house to house presenting the gospel of the Kingdom in printed form. I am called to follow in the footsteps of Jesus; for 'even hereunto were ye called; for Christ also suffered, leaving us an example, that ye should follow in his steps.' (1 Pet. 2:21) I here offer in evidence a card containing a certificate of ordination, also a testimony. I was not selling. I was placing the books on a contribution." R. 4-5.

The certificate of ordination received in evidence sets out further details of appellant's activity and his Scriptural authority to preach the gospel. It also identifies him as one of Jehovah's witnesses and an authorized representative of the Watchtower Bible and Tract Society. The pertinent portions of this certificate appear in the Record at pages 2-3.

Shortly after appellant placed the book with the complaining witness, the police placed him under arrest on the ground that he was peddling books without having obtained a license under the ordinance in question.

Appellant said that he did not have any secular occupation, but declared that he devoted his entire time to the preaching of the gospel by distributing Watchtower literature from house to house and upon the streets and talking to the people in their homes. (R. 4) He did not receive a salary or commission from the distribution of the literature. (R. 5) The record shows that "Bibles, books, booklets, and magazines are offered free to those that

are poor" at the personal expense of appellant. (R. 2) Appellant was thus dependent for his living upon the good-will contributions which he received from persons desiring to further the charitable cause in which he was engaged. The specified contribution of twenty-five cents for the book "Children" is "accepted for the publishing of other literature so that the Word of the Lord may have greater circulation in all this world for a witness, giving other people the opportunity of learning of God's gracious provision for them". R. 2.

How Federal Questions Raised

At the close of all the evidence in the Mayor's Court for the Town of McCormick, appellant filed a motion for a directed verdict on the grounds, *inter alia,* "That the Ordinance requiring the defendant to secure a license is in direct violation of the 14th Amendment of the Constitution of the United States in that it restricts the freedom of speech, freedom of the press and the freedom of worship of Almighty God." (R. 4) This motion was overruled and the County Court of General Sessions affirmed this ruling on appeal.

In the Supreme Court of South Carolina, by way of a Bill of Exceptions, appellant attacked the ordinance on the grounds that as construed and applied it abridged and denied his rights of freedom of press and of worship of Almighty God in that it was an undue burden thereon, contrary to the First and Fourteenth Amendments to the United States Constitution. R. 13-14.

The Supreme Court of South Carolina considered this exception to the ruling of the courts below it, and overruled appellant's contention. It held: "Thus we find no violation of the First Amendment (or the Fourteenth) to the Federal Constitution in the application of the ordinance to appellant and his book selling. It is not, in our opinion, unconstitutional as so applied." R. 20.

Specification of Errors to be Urged

Appellant intends to urge that the Supreme Court of South Carolina erred in failing to hold that the McCormick County Court of General Sessions and the Mayor's Court of the Town of McCormick, committed reversible error in overruling appellant's motion for a directed verdict filed at the conclusion of the evidence in the said Mayor's Court.

Preliminary Remarks

The court below has avoided the controlling precedent announced by this Court in the series of cases commonly styled *Murdock* v. *Pennsylvania*, 319 U. S. 105,[2] by adopting a different view of the facts of record. The South Carolina Supreme Court declared:

> "It is certainly not a distortion of the facts (see 63 S. Ct. at page 874) in this case to find, which we do, and hold, as did the lower Courts, that appellant's occupation was that of selling books and not that of colporteur." R. 19.

However, in approaching the federal question, this Court will first make an independent analysis of the facts, as it did in the *Murdock* cases.[3] In this connection it may be fairly observed that the only factual distinction mentioned in the opinion of the court below is that the appellant is a

[2] *Jones* v. *Opelika, Bowden and Sanders* v. *Ft. Smith, Jobin* v. *Arizona*, 316 U. S. 584, 319 U. S. 103; *Murdock, Perisich, Mowder, Seders, Lamborn, Maltezos, Anastasia Tzanes and Ellaine Tzanes* v. *Commonwealth*, 319 U. S. 105.

[3] See also *Truax* v. *Corrigan*, 257 U. S. 312, 325; *Sterling* v. *Constantin*, 287 U. S. 378, 398, and cases there cited.

"resident of a town, the ordinance of which is involved" rather than an "itinerant colporteur". (R. 18-19) The record in the *Murdock* cases, however, does not support this distinction. While it is true that the opinion of this Court speaks of "the liberties of itinerant evangelists" the text and reasoning leading up to this statement make it clear that the liberties restored to "their high constitutional position" in that case are not those possessed exclusively by those persons described by the court below as "passing or traveling about the country; going or preaching on a circuit; wandering". (R. 19) On the records in the *Murdock* cases this Court would not have been justified in so limiting the scope of the opinion.

The decision of this Court in the *Murdock* cases culminated a long series of controversies arising under the First and Fourteenth Amendments to the Federal Constitution over the misapplication of commercial license-tax laws and ordinances to the activities of Jehovah's witnesses. The broad constitutional guaranties have been found to cover the activity. It will not be necessary, therefore, to present further argument on this question. It seems plain that the constitutional issues in this case are governed by the pronouncements in the *Murdock* cases and can be summarily disposed of without further consideration.

If, however, the Court feels obligated to follow the findings of fact made by the court below, and assumes that the activity here is not religious but commercial, it will then become necessary to consider a further serious and substantial question:

Does the *commercial sale* of literature for profit push its distribution outside the protection of the First and Fourteenth Amendments to the Constitution, when such literature contains information and opinion?

Points for Argument

ONE

The ordinance is void and unconstitutional as construed and applied to appellant's activity because it abridges and unduly burdens by taxation the exercise by appellant of his right of freedom to worship ALMIGHTY GOD as His minister, contrary to the First and Fourteenth Amendments to the United States Constitution.

TWO

The ordinance is void and unconstitutional on its face and as construed and applied to appellant's activity because it bridges and unduly burdens by taxation the exercise by appellant of his right of freedom of press, contrary to the First and Fourteenth Amendments to the United States Constitution.

ARGUMENT

ONE

The ordinance is void and unconstitutional as construed and applied to appellant's activity because it abridges and unduly burdens by taxation the exercise by appellant of his right of freedom to worship ALMIGHTY GOD as His minister, contrary to the First and Fourteenth Amendments to the United States Constitution.

The record conclusively shows that appellant is a minister and devotes his entire time to the preaching of the gospel by means of the distribution of Bibles and Bible literature. Received in evidence was a copy of the book "Children" distributed by appellant, the distribution of which the court below found to be "within the meaning of the words 'exercise of religion', as they are used in the Constitution". (R. 17) With this assertion, appellant takes no issue. Upon these undisputed facts it is manifest that appellant was exercising his FREEDOM TO WORSHIP ALMIGHTY GOD, and the imposition of a license tax as a condition precedent to the exercise of that right infringes and unduly burdens this liberty set apart in a "preferred position" by the First Amendment.

So clearly and unmistakably has the activity here involved been identified by this Court as an exercise of the right of *Freedom of Worship* guaranteed under the First Amendment, that further discussion of the matter is unjustified. For this reason, we rest our contention, that the application of the ordinance to the activity of appellant violates his freedom to worship, directly upon the holding of this Court in *Cantwell* v. *Connecticut,* 310 U. S. 296; *Largent* v. *Texas,* 318 U. S. 418; *Jamison* v. *Texas,* 318 U. S. 413; and *Murdock* v. *Pennsylvania,* 319 U. S. 105.

If the Court finds that there has been an unconstitutional

violation of appellant's freedom to worship, then it will not be necessary to consider the next point.

TWO

The ordinance is void and unconstitutional on its face and as construed and applied to appellant's activity because it bridges and unduly burdens by taxation the exercise by appellant of his right of freedom of press, contrary to the First and Fourteenth Amendments to the United States Constitution.

Far-sighted American statesmen who shared in adopting the Bill of Rights were well aware of the tremendous educational, political, religious and social power inherent in the public press. They had observed the thoughtful writings of a few men, publishing among the people in crude leaflets or newspapers, shape the destiny of the new government, and they were convinced that if the new republic was to remain a government of the people, by the people, and for the people, this great power of the press must be secured inviolate. To do this, the sovereign American people adopted the First Amendment, forbidding Congress to enact any law abridging the freedom of the press. With the later adoption of the Fourteenth Amendment, this prohibition was extended to the several states.

Today the labored thumping of the few crude hand-presses of pre-Revolutionary War days has given way to the efficient hum of thousands of modern high-speed power presses. The local subjects of discussion of those times have been replaced by news and comment world-wide in scope. Haphazard distribution of a few papers is now dwarfed by modern circulation lists mounting up into millions, made possible by a labyrinth of news-conveying agencies and fast transportation facilities. No more is the

press merely a handy instrument for an enterprising few to express publicly their views and opinions. A tremendous commercial industry has sprung up, ranking among the nation's greatest profit-making ventures. Moreover, political parties, labor unions, social and other groups publish millions of tons of material annually in attempting to persuade their fellows to a particular point of view. In short, the importance and service of the public press to the American people has multiplied times beyond comprehension.

In the midst of all this expansion, the guaranty of the freedom of the press expressed in the First Amendment has remained the same. It could not become more absolute, nor did it lose any of its protective powers. Justice Brewer ably characterized the permanency of the Constitution: "the Constitution is a written instrument. As such its meaning does not alter. That which is meant when adopted it means now."[4] Chief Justice Taney believed that in its present form it speaks not only in the same words but with the same meaning and intent as when it came from the hands of its framers.[5] It becomes important, then, to determine what the framers of the Constitution intended to protect when they declared that "Congress shall make no law . . . abridging the freedom . . . of the press." A determination of this question requires an examination of the history and circumstances which antedated and attended the adoption of this clause. The history is a long one, but for the present purpose it may be greatly abbreviated.

Very soon after the introduction of the printing press into England by William Caxton, in 1476, the Crown assumed complete control of the press. Henry VIII did so by authority of his kingly prerogative and the issuance of Letters granting a monopoly of the privilege of printing and distributing and selling books. Under Mary, control

[4] *South Carolina* v. *United States*, 199 U. S. 437, 448 (1905).

[5] *Scott* v. *Sanford*, 16 How. 393, 426 (1856). See also *Truax* v *Corrigan*, 257 U. S. 312, 338.

of printing was maintained by limiting such right to the Stationers' Company which was founded by royal charter in 1557. The number of presses was limited, all publications were subject to previous inspection, and the seat of regulation was in the Court of the Star Chamber, which had been granted the power of general censorship. Both the Tudors and the Stuarts resorted to this court for the suppression of seditious libels.

Under Elizabeth, the number of printers was limited to twenty, no one could print except under royal patent, and no book could be printed except in London, Oxford or Cambridge. During the reign of Elizabeth, prosecutions for seditious libel continued, and in 1586 the Star Chamber published stringent ordinances for the regulation of the press, again restricting the presses to London, Oxford and Cambridge. Under these ordinances no one was permitted to print anything until it had been "seen and allowed" by the archbishop of Canterbury or the bishop of London —except the queen's printer or the law printers, who were licensed by the chief justice and the chief baron. The Stationers' Company was authorized to search houses and shops, to destroy all books printed in violation of the ordinance, and also to destroy all unlicensed presses.

The early Stuarts, James I and Charles I, claimed all the royal prerogatives of their predecessors. Prior to 1637, the number of unlicensed printers had become so great that the Star Chamber decreed that all printed books must be submitted for license and must be registered by the Stationers' Company before publication, under penalty of forfeiture of the presses. Law books continued to be licensed by the chief justice or the chief baron of the Exchequer, books of history and politics by the secretaries of State, books of heraldry by the earl marshal, and all others by the archbishop of Canterbury and the bishop of London. Only twenty master printers were permitted, and no one could have more than three presses. Prosecu-

tions for sedition and seditious libel continued to be brought in the Court of Star Chamber. One of the most notorious was the prosecution of Prynne, who published a work attacking the theater, hunting, public festivals, etc. He was sentenced to stand twice in the pillory, to lose both ears, to pay a fine of five thousand pounds, and to be imprisoned for life.

Although the Court of the Star Chamber was abolished by Act of Parliament in 1641 and restrictions upon freedom of the press disappeared temporarily, the Long Parliament, in June 1643, re-established regulation and licensing of printing; it declared that no order of either house of Parliament should be printed except by their express consent and that no book or pamphlet whatsoever should be printed unless it had been first licensed and entered in the register of the Stationers' Company. The latter was again authorized to search for unlicensed presses and books and to destroy them, to arrest authors and printers and to inflict punishment upon them. It was the passage of this licensing act of 1643 that inspired John Milton to write his "Areopagitica", which was itself written and published in violation of the license statute. The Licensing Act was repealed in 1649 and for a short time even the licensed press was suppressed by Parliament, but the statute was re-enacted in 1650. In 1655 Cromwell suppressed all publications except two official publications conducted by Nedham, who continued to control the press until his death. In 1659, General Monk, after Cromwell's death, encouraged Henry Muddieman to begin the publication of a paper called "Parliamentary Intelligencia" and in 1660 the Council of State suppressed the two papers conducted by Nedham. The Licensing Act was re-enacted in 1662 and was in substance the same as the Star Chamber order of 1637. All books or pamphlets had to be entered with the Stationers' Company; the master printers were still limited to twenty, and books could be printed only in

London, York, or at the universities. The Act was in effect for two years and was renewed from time to time until 1679. It was again renewed in 1685 and remained in effect until 1695. Although during this period there were numerous prosecutions for seditious libel, the publication of papers, tracts, leaflets, etc., increased enormously.

Under James II, a large number of printers, in spite of the Licensing Act, carried on their art in the garrets and other secret places of London. During his reign, the Licensing Act was renewed and was enforced in a particularly tyrannical manner except against the Jacobite Press, which was permitted to publish articles favorable to the King.

Under William and Mary, the Licensing Act was again renewed. When the last renewal expired in 1695, the Committee of the House, which had the Act under consideration, recommended a further renewal, but when submitted to a vote, the report of the committee was defeated.

About this time daily newspapers appeared and criticism of the House of Commons became so violent that, at the suggestion of Queen Anne, in 1712, the House resorted to a new method of restricting the freedom of the press. It enacted a stamp tax on newspapers and a tax on advertising. For nearly a century and a half thereafter there was constant oppression by levy and collection of these taxes. These taxes were one of the chief causes for unrest among the American Colonists and were commonly called "Taxes on Knowledge". Their purpose was to curtail the circulation of cheap newspapers among the masses of the people, and in this they were actually successful to a certain extent although papers on which the tax had not been paid continued to be printed in violation of the law. From time to time the amount of the "stamp tax" was increased in order to restrict the circulation of cheap newspapers. Progressive increases were enacted in 1756, 1789, 1798, 1804, and 1814. In 1836,

the tax was reduced for the first time, but a heavy duty was levied on the paper material itself. The direct result of these taxes was to make the printing of newspapers costly and to restrict their circulation. The advertisement tax was reduced in 1833, and abolished in 1853. The "stamp tax" was finally abolished in England in 1855, and the duty on paper was repealed in 1861.

Prior to adoption of the Constitution of the United States, not only did the British Parliament impose stamp taxes on newspapers in the colonies but some of the colonies themselves established such taxes. Massachusetts imposed a stamp tax on newspapers during the years from 1755 to 1757. New York imposed such a tax from 1757 to 1760. In 1765 the British Parliament imposed a tax on all colonial newspapers of from a half penny to a penny according to the size of the newspaper, and a tax of two shillings on every advertisement. This tax raised a storm of protest in the colonies, who cried out against these taxes as "taxation without representation".

In 1785 the Massachusetts legislature imposed a stamp tax on all newspapers and magazines, and the following year an advertisement tax was imposed. Both taxes met with violent opposition. The former was repealed in 1786, the latter in 1788.

It is significant to note that these laws made no distinction between commercial publishing and non-commercial publishing. Both were restricted alike. The so-called "advertisement tax" levied against *commercial advertisement* was hated by the freedom-loving populace as much as the censorship of publications containing information and opinion. In *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248-249, after briefly reviewing the history of the struggle for freedom of the press, this Court held:

> "The framers of the First Amendment were familiar with the English struggle, which then had continued for nearly eighty years and was destined to go on

for another sixty-five years, at the end of which time it culminated in a lasting abandonment of the obnoxious taxés. The framers were likewise familiar with the then recent Massachusetts episode; and while that occurrence did much to bring about the adoption of the amendment (see *Pennsylvania and the Federal Constitution,* 1888, p. 181), the predominant influence must have come from the English experience. . . .

"In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well-known and odious methods."[6]

This correct statement of the law is in direct conflict with the holding of the Supreme Court of South Carolina, where it is said, "It seems, and is, a very far cry from the import of the foregoing clause [of the First Amendment] to the occupational license ordinance in question". R. 17.

[6] In *Commonwealth* v. *Reid,* 144 Pa. S. C. 569, 574, 20 A. 2d 841, 843, President Judge Keller, speaking for the Superior Court, said: "The historical reference to 'pamphlets' in that [*Lovell* v. *Griffin,* 303 U. S. 444] opinion and in other opinions of that Court [*Schneider* v. *State,* 308 U. S. 147, 164; *Thornhill* v. *Alabama,* 310 U. S. 88, 97; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 245-250, etc.) is not limited to 'pamphlets' which are distributed without cost. Every student of history knows that the 'pamphlets' referred to by Chief Justice Hughes in his opinion and by Mr. Justice Sutherland in the *Grosjean* case, were not for the most part circulated *gratis,* but were distributed to subscribers or sold." See also *Hannan* v. *Haverhill,* 120 F. 2d 87, 88-89; *Blue Island* v. *Kozul,* 379 Ill. 511, 41 N. E. 2d 515; and *Vermont* v. *Greaves,* 112 Vt. 222, 22 A. 2d 487, involving Jehovah's witnesses, wherein the right of *sale* was found to be within the constitutional protection.

For dissenting Justices in *Murdock* v. *Pennsylvania*, supra, at pages 120 to 130, inclusive, Mr. Justice Reed, argues that the advocates for adoption of the Bill of Rights did not desire to exempt press activity from taxation, and further that the framers of the First Amendment did not contemplate a prohibition against press taxation. This conclusion is not only unwarranted by history, but is also contrary to the facts. During the struggle for ratification, Richard Henry Lee, speaking for those demanding a *Bill of Rights* amendment to the newly adopted Constitution, declared that while Congress had no delegated power to interfere with the freedom of the press, it did have a delegated power to tax and might, therefore, lay a tax on printing so burdensome and discriminatory as to destroy a free press.[7] This clearly shows that the type of abridgment here sought to be sustained is the very evil anathematized by proponents of the Bill of Rights in terms of the First Amendment. This should persuade the Justices dissenting in the *Murdock* cases to reconsider their views expressed concerning the intent of the framers of the First Amendment and the proper construction to be given the amendment concerning freedom of press.

The license tax imposed upon appellant by the application of the ordinance is precisely the kind of tax that the people of this country rejected with the adoption of the Bill of Rights. The tyrannical theory of "law" that permitted application and enforcement of such interferences with the press was the heavy yoke that the early Americans succeeded in throwing off during the Revolutionary War. It was this type of burden and restriction upon the press that this Court unanimously struck down in the *Grosjean* case. That case cannot be distinguished

[7] The substance of this statement appears in a public letter written by Richard Henry Lee, dated October 12, 1787, included in *The Federalist and Other Constitutional Papers*, E. H. Scott, published by Albert, Scott and Company, 1894, pp. 872-873.

in principle from the controversy at bar, for the opinion, at page 244, clearly declares:

> "The tax imposed is designated a 'license tax for the privilege of engaging in such business'—that is to say, the business of selling, or making any charge for, advertising. As applied to appellees, it is a tax of two percent on the gross receipts derived from advertisements carried in their newspapers when, and only when, the newspapers of each enjoy a circulation of more than 20,000 copies per week. It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid (*Magnano Co.* v. *Hamilton*, 292 U. S. 40, 45, and cases cited), it well might result in destroying both advertising and circulation."

and at page 250:

> "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press."

On the basis of this Court's decision in the *Grosjean* case, the Supreme Court of Florida on November 23, 1943, invalidated a similar license tax graduated on the basis of circulation of commercial newspapers. *City of Tampa* v. *Tampa Times Co.*, —Fla.—, 15 S. 2d 612, 12 LW 2310.

The tax imposed by the ordinance here strikes directly at circulation of printed publications. It is not one of the "ordinary forms of taxation" despite its simple appearance. The fixed tax is laid and collected upon the privilege of

distributing or selling books without reference to the scope of the activities of the distributor or his realized revenue. Neither is it a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is a flat license tax levied and collected as a condition to the *exercise* of rights guaranteed by the First Amendment. Its direct tendency is to throttle and restrain *in advance* the EXERCISE of the constitutional right. So recently and clearly did this Court settle unconstitutionality of such a flat license tax demanded as a condition precedent to *exercise* of a right guaranteed by the First Amendment (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 108, 111-115), that it is unnecessary to indulge in further analysis of the matter.

It cannot be argued that localized peripatetic *selling* of didactic books is not a right secured under the First Amendment. From what has just been said concerning the history of the adoption of the amendment, it is plain that ALL "printed" (recorded) matter of public concern was included in the word *"press"*.

Nothing is said in the amendment itself about protecting only publications containing information and opinion and circulated without charge. To read such a restriction into the amendment would result in the immediate destruction of the public PRESS as it exists today.

If a Massachusetts tax upon *commercial advertising* led, to some extent at least, to adoption of the First Amendment, and if a Louisiana tax upon *commercial advertising* justified the exercise of the protective powers of the amendment, then by greater force of reason a flat tax upon the distribution of a book containing no commercial advertising but devoted exclusively to an explanation of Bible prophecies concerning God's Kingdom outrages one of the most cherished and essential rights and privileges of Americans. It cannot stand.

To those who have closely watched the recent trend

of the decisions of this Court in dealing with freedom of the press, there has been an alarming line of *dictum* running through the opinions. In *Schneider* v. *State*, 308 U. S. 147, 165, *Jamison* v. *Texas*, 318 U. S. 413, 417, and *Murdock* v. *Pennsylvania*, 319 U. S. 105, 109-110, the Court specifically disclaimed application of the doctrines in favor of freedom of the press to cases where there was "commercial soliciting or canvassing". The Court went even further in *Valentine* v. *Chrestensen*, 316 U. S. 52, 54, and ruled that a municipality could absolutely prohibit distribution of a leaflet containing *both* (1) information and opinion AND (2) "purely commercial advertising", which *advertisement* was the primary motive of the circulation. Thus it appears that there is a double restriction: First, "commercial" publications do not enjoy the protection of the First Amendment, and, second, non-commercial publications distributed by commercial methods are likewise unprotected.[8]

It should be noted here, however, that the *Chrestensen* case and dictum in the other cases mentioned are not in point. Here the record is conclusive as to the non-commercial "religious" nature of the publications being distributed. None of the literature contained a single line of advertising material. But even so, this Court has held that advertisements of "religious" books are protected. *Jamison* v. *Texas*, 318 U. S. 413, 417. The court below, however, extends the principle announced in the *Chrestensen* case far beyond the limits of its intended application, relying on the dictum of this Court in the *Murdock* cases, wherein it was stated, "Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction is vital at times. . . . *Valentine* v. *Chrestensen*, 316 U. S. 52, 55." The application of this doctrine to this case justifies a brief discussion of the constitutional soundness of the theory.

[8] Cf. *Jones* v. *Opelika*, 316 U. S. 584, 596-598.

Under the double restriction on freedom of the 'commercial press', there is only one type of publication left to be distributed under the protection of the Constitution. Applying the doctrine equitably to all publications that are either commercial or are distributed in a commercial manner, all newspapers, magazines and other familiar periodicals containing vital information and opinion with advertisements, will be found to survive and exist only at the pleasure of the government, without constitutional FREE PRESS protection, while only non-profit, non-commercial publications containing "information and opinion" exclusively would enjoy the protection, but, even then, the distributors would carefully have to avoid all appearance of "commercial aspirations". It is safe to say that in a very short while, if this Court's dictum were extended with the doctrine announced in the *Chrestensen* case, conditions would be little better than they were in the days of Queen Elizabeth.

It seems absurd to seriously consider these possible consequences, but it is alarming to consider how very near this Court has come to sustaining the legal justification for such a condition.

The only difference between the condemned LEAFLET in the *Chrestensen* case and each copy of any issue of any large metropolitan newspaper is the size and number of sheets delivered by the ultimate distributor, whether he be an ambulating vendor or the custodian of a newsstand. Often some such papers have as much as seventy percent of the entire space devoted to advertisement of a commercial nature. Rural newspapers are no exception. Advertising of a commercial nature is the chief means of revenue for the newspapers. In *Grosjean* v. *American Press Co.*, supra, this Court invoked the protection of the First Amendment specifically in behalf of *commercial advertising* carried by the newspapers.

Unless the *Grosjean* case is viewed as reversed, it is

difficult to reconcile this Court's dictum in the many cases involving Jehovah's witnesses and the decision in the *Chrestensen* case, on the one hand, with the *Grosjean* case, on the other; for the holdings are at odds.

Furthermore it is hard to understand how this Court can be so clear as it states itself to be in the *Chrestensen* case with respect to "purely commercial advertising" when it has so strongly supported the protection of advertising of labor matters and labor controversies which constitute only one element of commerce. In the one instance "services" are SOLD (by the laborers) while in the other, such as in the *Chrestensen* case, other material values are SOLD, or in the case of a merchant it is goods that are to be sold.

Reason dictates that *politics, commerce* and *religion* stand on the same level under the First Amendment. One does not have a superior right over the other to advertise for its own benefit.

It is noteworthy to observe that the Supreme Court of South Carolina overruled its own precedent established in July, 1941, in the case of *The State* v. *Thomas Meredith*, 197 S. C. 351, 15 S. E. 2d 678. This Court in the *Murdock* opinion cited that *Meredith* case as authority for the proposition that the activity of Jehovah's witnesses in distributing literature did not constitute a commercial rather than a "religious" venture. This Court agreed with the finding and conclusion of the South Carolina Supreme Court that: ". . . the 'sale' of the book by defendant was merely collateral to the main purpose in which he was engaged, which was to preach and teach the tenets of his religion." In the *Meredith* case, the court below says that it found no *profit motive* involved, but here there was such a motive, and it was that *motive* that sustained the application of the tax. The court below hangs this proposition on the only peg left sticking out of the *Murdock, Jamison* and *Schneider* opinions.

This merely illustrates how easy it becomes to side-

track the First Amendment by the simple expedient of dropping or placing hairline distinctions in the path of liberty, thereby shunting the activity out of the groove of non-commercial enterprise into the allegedly "unprotected" rut of commercialism. The freedoms guaranteed by the amendment are too fundamental and vitally necessary to the success of constitutional democratic government to be based on such a flimsy foundation as would allow the rights to exist only where they do not partake of any "commercial" characteristics. There are almost no undertakings or ventures that could not in some way be viewed as partaking of *commercialism*. "Facts of record" are too easily distorted by courts to permit this destructive distinction to stand. If this alien precept of law were affirmed, then a way would exist to censor, license and suppress the public press.

Although there is but a small license fee involved here, let not the implications it carries be underestimated. If the municipality has the power to levy a tax on this activity because the JUDICIARY has *falsely* labeled it "commercial", then the LEGISLATURE (state *and national*) has the power to regulate, censor and prohibit it altogether because "commercial", as was held—*wrongly*, we submit—in the *Chrestensen* case. The activity which it is alleged brought appellant within the reach of the ordinance is the same activity that this Court brought within the protection of the First Amendment in *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Jamison* v. *Texas*, 318 U. S. 413; *Largent* v. *Texas*, 318 U. S. 418; *Taylor* v. *Mississippi*, 319 U. S. 583; *Martin* v. *Struthers*, 319 U. S. 141; *Murdock* v. *Pennsylvania*, 319 U. S. 105. It would seem that if this activity is deserving of the protection of the First Amendment against censorship, unessential regulation, and prohibition, it is likewise and by the same token entitled to

protection against taxation on the pretext that it is a "commercial" enterprise.

Endangering of the people and the entire public press, upon which the public depends for news and other information procurable at low cost (made possible largely by commercial advertising that supports the newspapers), through the doctrine announced in the *Chrestensen* case, has been heretofore discussed. That argument is not repeated here but this Court, before passing on the questions presented, is requested to review such arguments.[9]

If this Court sustains a tax upon the distribution for profit of literature containing information and opinion, or newspapers containing a large percentage of advertising, it will thereby approve a principle which permits prohibition or censorship of such publications and their distribution. For, once a tax in any amount is sustained the courts are powerless to intervene to protect against an increase thereof to a point of destruction or prohibition of the object affected thereby.[10]

Only recently has the strange doctrine been announced that the test of the application of the First Amendment will be whether or not the activity seeking the protection of the Constitution is "commercial". Already the results of this doctrine have caused confusion. The basis for the now vacated decision of this Court in *Jones* v. *Opelika*, 316 U. S. 584, was ". . . because we view these sales as partaking more of commercial than religious or educational transactions". Therefore, this Court originally did "find the ordinances, as here presented, valid". Then a few months later the majority of the Court changed its view of the *same transactions* and held that they were

[9] See Appellant's brief in *Jamison* v. *Texas*, No. 558, October Term 1942, pages 28-31. See also appellant's *jurisdictional statement*, this case, page 15.

[10] *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548; *McCray* v. *United States*, 195 U. S. 27, 59-60; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 167; *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 45.

not commercial but were an "age-old form of missionary evangelism".[11] That reversal is significant in that it was accomplished not by a different constitutional construction, but merely by an adjusted view of the activity of Jehovah's witnesses. In reversing itself, the Court admits that the distinction between commercial and non-commercial activity may at times be "difficult".

Obviously, adherence to the *Chrestensen* rule will reduce the solid and lasting protection afforded by the Constitution to the *Press*, to the mere passing notions of members of the judiciary. Judges would be compelled to indulge in sophistry and make hairline distinctions as to what is "commercial" in "difficult" situations. At best, the application of the doctrine would only result in drawing arbitrary lines of distinction without foundation in law, dependent only upon social, economic or political views of the majority of jurists in power. The fine distinction made between the activity in *Jamison* v. *Texas*, 318 U. S. 413, and in *Valentine* v. *Chrestensen*, 316 U. S. 52, is an example of such a distinction WITHOUT A DIFFERENCE so far as the Constitution is concerned.

As Chief Justice Taft put it,[12] "this is a government of laws and not of men." The same idea was expressed by Justice Story:[13]

> "What is to become of constitutions of government if they are to rest, not upon the plain import of their words, but upon conjectural enlargements and restrictions to suit the temporary passions and interests of the day. . . . They are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders; they are to speak the same voice now and forever."

Unless the constitutional rights of the people are to be

[11] *Murdock* v. *Pennsylvania*, 319 U. S. 105, at page 109.
[12] *Truax* v. *Corrigan*, 257 U. S. 312, 332.
[13] Story, *Commentaries on the Constitution*, Vol. 2, p. 653.

tossed around the judicial arena according to the rule of thumb of the judges, the unfortunate distinction between the standing of commercial and non-commercial publications under the Constitution must be abrogated.

Exquisitely appropriate are the words of the eminent law writer Vattel:[14]

> "The constitution of a State and its laws are the foundations of public peace and the firm support of political authority, and the security for the liberty of citizens. But this constitution is a mere dead letter, and the best laws are useless if they be not sacredly observed. It is therefore the duty of the nation to be ever on the watch that the laws be equally respected both by those who govern and by the people who are to be ruled by them. To attack the constitution of the State, and to violate its laws is a capital crime against society; and if the persons who are guilty of it are those in authority, they add to this crime a perfidious abuse of the power confided to them. A Nation must uniformly put down such violations with all the vigor and vigilance which the importance of the case demands. . . .
>
> "The constitution and laws of a State are rarely attacked from the front; it is against secret and gradual attacks that a Nation must chiefly guard. Sudden revolutions strike the imaginations of men; their history is written, and their secret sources are made known; but changes are overlooked when they come about insensibly by a series of steps which are scarcely noted. . . ."

It is singular that the distinction made by this Court in the *Chrestensen* case is made without citation of authority,

[14] E. de Vattel, *The Law of Nations, or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns.* (Trans. from edition of 1758 by Charles G. Fenwick in "The Classics of International Law", Washington, 1916).

or justification in reason. The arbitrary discrimination between the two types of publications in that opinion completely ignores the real meaning and purpose of the guaranty of a free press. The value of "freedom of the press" does not lie exclusively in freedom to print and to circulate. Exercise of those rights is only a means to an end—the ultimate object of the constitutional guaranty. The people of the United States secured "freedom of the press" because they desired FREEDOM TO READ.

Similarly, they secured "freedom of speech" because they wanted FREEDOM TO LISTEN.[13]

The founding fathers wisely felt that true democratic government rested upon the capacity for self-government which, in turn, is founded upon the unstinted diffusion of knowledge. Said Thomas Jefferson: "Enlighten the people generally and tyranny and oppressions of the body and mind will vanish like spirits at the dawn of day." James Madison, one of the Fathers of the Constitution, stated it even more bluntly: "A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy." More recently, this Court, in *Martin* v. *Struthers*, 319 U. S. 141, announced a similar view:

> "The authors of the first amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. *This freedom embraces the right to distribute literature,* and *necessarily protects the right to receive it.*" [Italics added]

Thus, the freedoms in the First Amendment cannot be

[13] This Court's opinion in *National Broadcasting Co., Inc., et al.* v. *United States et al.*, 319 U. S. 190, loosed a flood of comment in Congress on the *Freedom to Listen*. See 89 Cong. Rec. No. 167, pp. A5027, A5029. Analysis of the subject made by James L. Fly, chairman of the Federal Communications Commission, is particularly enlightening: 89 Cong. Rec. No. 164, p. A4915. See also 89 Cong. Rec. No. 164, p. A4991.

measured by the character of the initiating parties involved. In each case the real test is the consideration and determination as to whether or not the *article* or *service* delivered to the people of the United States falls into any one of the categories specified for protection by the Constitution. If the *article* or *service* is found to be one of those things which the sovereign PEOPLE have secured unto themselves by the First Amendment, then such *article* or *service* is beyond the reach of the federal or state government's control up to the point of abuse of the right where the police power necessitates interference.

When this common-sense view is taken of the First Amendment, and aside from all the many supporting precedents announced by this Court, it will be found that regardless of the fact that many presses or, as the matter actually is, *most* presses turn out the printed page primarily for pecuniary gain that will be derived through its circulation, still the PEOPLE are protected simultaneously in their right to *receive* the benefits of the printed page—entirely apart from benefit accruing to distributors, and apart from the distributors' claim for protection.

Suppose that appellant here were motivated solely by the most selfish of desires for personal enrichment in distributing the book *Children* to the people. Assume further that the book contained information of the most vital and important character for the public benefit. Could it possibly be contended that the municipality has the right to deprive the people of their right to *receive* the information in that book, solely because the distributor was making a profit from the distribution or was "selling" the book for *commercial* purposes or in a *commercial* manner? If a householder desires information contained in a book or other publication, what difference could it possibly make to him that the person bringing it to him is inspired by "commercial" rather than "religious" motives? As far as the constitutionally protected right of the public is concerned, what

difference does it make that the mode of distribution ("sale") partakes "more of commercial than religious or educational transactions"?

Consider also the matter of commercial advertising. From the viewpoint of the people's *Freedom to Read*, a commercial dodger or handbill advertising the display of a navy submarine might be of great interest to many persons. It might have more real educational value to the passing pedestrian and to the welfare of the Government than the tendered leaflets of the Young Communists League or the 'commercially tainted' handbill of the Friends Lincoln Brigade approved by this Court in the companion case from Los Angeles decided with *Schneider* v. *State*, supra.[16] A circular announcing a special sale of two-pants suits might contain information more useful to recipients than a paper advocating establishment of a so-called "Christian Front".

In any event, who is to determine what the people have a right to read and what they may not read? Certainly the legislature does not have the right to make the determination;[17] nor do the courts have that prerogative. It appears, however, at the present time that the Supreme Court of the United States has taken over this "difficult task", as in *Valentine* v. *Chrestensen*, supra; and *Jamison* v. *Texas*, supra. It is high time that this Court admit its incompetence to decide for *the people* the very thing the sovereign PEOPLE reserved to themselves in the First Amendment.

The Constitution is a written compact in which "the sovereignty of the people and the responsibility of their

[16] "On the hand-bill were the words 'Admission 25c and 50c'. The Superior Court adverted to these and said: 'Whatever traffic in ideas the Friends Lincoln Brigade may have planned for the meeting, the *cards themselves seem to fall within the classification of commercial advertising* rather than the expression of one's views.' [Italics added]" ROBERTS, *J.*, *Schneider* v. *State*, 308 U. S. 147, 155, note 3.

[17] *Taylor* v. *Mississippi*, 319 U. S. 583; *Bridges* v. *California*, 314 U. S. 252; *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Near* v. *Minnesota*, 283 U. S. 697; *Schenck* v. *United States*, 249 U. S. 47; *Stromberg* v. *California*, 283 U. S. 359; *Thornhill* v. *Alabama*, 310 U. S. 88.

servants are principles fundamentally and unequivocally established; in which the powers of the several branches of government are defined and the excess of them, as well in the legislature as in the other branches, finds limits, which cannot be trangressed without offending against the greater power from whom all authority, among us, is derived; to wit, the people."[18]

This controversy affords an appropriate occasion for this Court to declare that freedom of speech and freedom of the press belong to the sovereign people, FREE from any burdens or previous restraints such as censorship or taxation; that *the people* have a constitutional right to hear and read what they please whether it be commercial or non-commercial; that both the LEGISLATURE and the JUDICIARY are without authority outside the police power to make a choice for *the people* as to what they have the right to read.

Epitome

Recognizing the gravity of world conditions that now face mankind, the President of the United States recently made this timely observation:

> "In these days of struggle which try every soul and every institution and every tradition, we are all in desperate need of a light that is not of man. May God grant that the church will not fail in providing the light in our spiritual darkness. For if we lack spiritual guidance for our immediate problems and set our feet in consequence upon obscure ways, our children shall wander for long years in a moral wilderness." [19]

[18] Tucker's *Blackstone* (ed. 1803), Vol. 1, p. 88, note.

[19] Associated Press dispatch of December 15, 1943, quoting President Roosevelt's reply to an inquiry made by the bishop of the Episcopal Diocese of Connecticut relative to what the president believed to be the function of the Christian church in the world today.

Appellant, a Christian minister, declared that his work was just as expressed by Jehovah's prophet Isaiah, "... the LORD hath anointed me to preach good tidings unto the meek; he hath sent me to bind up the brokenhearted, to proclaim liberty to the captives, and the opening of the prison to them that are bound; to proclaim the acceptable year of the LORD, and the day of vengeance of our God; to comfort all that mourn."[20] Regardless of the apparent unconcern of the courts below for the public importance of this activity, the fact is that appellant was engaged in the performance of a duty unequaled in its necessity for the welfare of the people of the Town of McCormick, South Carolina. In distributing to the people literature setting forth the gospel message, appellant was no more "selling books" than priests would admit that they "sell masses". A flat tax upon the exercise of appellant's activity violates the Constitution and the conviction cannot stand.

In *Valentine* v. *Chrestensen*, supra, this Court vigorously condemned the employment of a subterfuge to bring the handbill within the protection of the First Amendment. Here, and for the same reason, it should publicly discountenance the manifest subterfuge devised by the court below to deprive appellant of his constitutional right to worship Almighty God Jehovah by distributing literature explaining the Bible, and to *sidestep* the mandate of this Court in *Murdock* cases. But should the subterfuge of the court below be accepted here in good faith, and appellant be regarded as a resident *commercial* "book agent", nevertheless the device chosen and used to throttle his activity fails against the protection afforded *all publications*, commercial and non-commercial, under the First and Fourteenth Amendments.

In these days of unrest that "try men's souls", the grave responsibility of this Court to "the people of the United

[20] Isaiah 61: 1, 2; see also Luke 4: 18, 19, where Jesus quoted Isaiah's prophecy as His commission.

States" to defend and protect the rights and liberties of *the people* is no light burden and is concededly heavier than in any other time in the history of the Court. Despite the declarations to the contrary by the courts below, the conviction of appellant challenges the most cherished rights of Americans. The high duty of the Court under these circumstances is well stated by the late Justice Cardozo:[21]

> "The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith.
>
> "Great maxims, if they may be violated with impunity, are honored often with lip-service, which passes easily into irreverence. The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and

[21] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, 1921), 92-94.

directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them."

Conclusion

The judgment of the court below should be reversed, and appellant discharged, with costs.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1943

No. 426

LESTER FOLLETT, APPELLANT,

versus

TOWN OF McCORMICK, SOUTH CAROLINA,
RESPONDENT

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S BRIEF

J. FRED BUZHARDT,
JEFF D. GRIFFITH,
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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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Supreme Court of the United States

OCTOBER TERM, 1943

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LESTER FOLLETT, APPELLANT,

versus

TOWN OF McCORMICK, SOUTH CAROLINA,
RESPONDENT

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENTS' BRIEF

FACTS SHOWING QUESTIONS PRESENTED

The respondent regrets that it cannot agree with the statement of facts made by appellant in his brief, but it feels that the facts, as shown by appellant's brief, do not correctly give a history of the case and sufficient facts to enable the Court to pass upon this case.

Appellant, Lester Follett, became a resident of the Town of McCormick some time before his arrest, and, at the time of his conviction, resided in said town (Record, 4). He claimed to be a regularly ordained minister, and he engaged in selling books in the Town of McCormick, South Carolina. His arrest followed his refusal to obtain a license

required by a town ordinance which provided: "That the following license on business, occupation, and professions to be paid by the person or persons carrying on or engaged in such business, occupation or professions within the corporate limits within the Town of McCormick, South Carolina." This ordinance, among other things, requires agents selling books to pay a license of one dollar per day or fifteen dollars per year. At the time he undertook to sell and did sell the book entitled "Children," appellant distributed a pamphlet entitled "End of Axis Powers" (Record, 8). Although he claimed to be a member of a sect known as "Jehovah's Witnesses," and this group or organization pretends to be a religious organization, distributing Bibles, books, booklets and magazines (Record, 2), there is no evidence in the record nor was there any before the Town Court of McCormick, the Circuit Court of General Sessions, or the Supreme Court of South Carolina, that appellant ever attempted to preach any religion, promote any religious beliefs, or sell any Bibles in the Town of McCormick. It is true that the certificate offered in evidence by the appellant stated that he was an ordained minister of Jehovah God, one of "Jehovah's Witnesses," and that, as Jehovah's witness, he offered Bibles, books, booklets and magazines free to those who are poor or on contribution. However, there is no testimony that he offered to sell Bibles, to preach the Gospel, or to convert anyone to his way of thinking. The only conflict in the testimony, as presented to the jury in the Mayor's Court, was that the appellant claimed that he offered to place his book, "Children," on "contribution," and the witnesses for the town claimed that he did not mention contribution but attempted to sell the book in question (Record, 6).

At the close of the testimony the appellant moved for directed verdict of not guilty on the grounds that the or-

dinance was in violation of the United States Constitution in that it restricted the freedom of worship. This motion was overruled and the appellant was found guilty by the jury (Record, 6). Within due time a notice of appeal was given to the Circuit Court of General Sessions, which Court upheld the findings of fact and the conclusions of law reached by the Mayor's Court, and thereafter the case was appealed to the South Carolina Supreme Court. This Court, the same Court which handed down the opinion in the case of *State v. Meredith*, 197 S. C., 351, held that the facts in the case before the Court were entirely different from those in the *Meredith case*, and affirmed the judgment of the Courts below.

In setting out the facts in this case the respondent feels that it is necessary to call particular attention to the type of book being sold and the pamphlet distributed by the appellant.

The title of the book which was offered for sale, and was sold in the Town of McCormick, was "Children." A casual reading of the book shows that the name of the book is entirely misleading, that it is definitely not a book capable of being understood by a child, but is a name given the book for the purpose of concealing what it really is (Record, 7). Although the appellant claims that the book is a religious book it carries such statements as: "Religious organizations furnish no protection whatever to the people. Religion is entirely contrary to the will of God, and is a snare. Today religion is fully united with dictators or arbitrary rulers of the earth." * * * "Religious ceremonies produce no good results, and are in vain and injurious. Religion is heathenish." * * * "Religion is demonism." * * * (Record, 8.)

At the time the appellant undertook to sell and did sell the book, "Children," he distributed copies of the pamphlet

mentioned above, "End of Axis Powers." According to the opinion of the Circuit Judge who heard this case this name is entirely misleading. The appellant and the society for which he worked is undertaking to defy all government and to set up what they call Theocracy. Quoting from the pamphlet, "End of Axis Powers" (Record, 8, 9):

> "The facts are indisputable, and therefore admitted, that the Nazis, Fascists and the mightiest religious organization on earth, acting together and designated as 'the Axis Powers,' now rule from Norway to Egypt and within that realm the people mourn. That ruling power is opposed to the Kingdom of God under Christ and violently opposes everyone who advocates The Theocracy.
>
> "Opposing the Nazi, religious combine is another mighty world power, carried on by the political and commercial strong men of those nations, and ably supported by religious leaders. That world power is generally known as the advocate of Democracy, and during the World War from 1914 to 1918 adopted and used the slogan: 'This war will make the world safe for democracy.' That ruling power does not advocate the kingdom of God and hence is against The Theocracy.
>
> "The only hope for peace and life rests in The Theocratic Government. All persons now on earth who expect or hope to live must flee to that righteous government, and all others shall be destroyed."

It appears that appellant was not, at the time of his arrest and trial, a minister but an agent appointed by the Watchtower Bible and Tract Society of Brooklyn, N. Y., and that the book he was selling was not religious at all, but a mere propaganda publication (Record, 8).

Respondent agrees that there are few issues for the Court to determine in this case. If the appellant is an itinerant minister of the Gospel, and, if his activities complained of in the present instance were for the purpose, primarily, of promoting his religious beliefs, then there is

no doubt that this case is similar to the cases of *State v. Meredith*, 197 S. C., 351, and *Murdock v. Pennsylvania*, 319 U. S., 105. However, the record shows that appellant is not an itinerant minister since he lived in the Town of McCormick. The defendant testified that he made a living from money received from those with whom he placed the books; that he had no other source of income. He denied that he "sold" the books but stated that he left them with persons contributing the amount of twenty-five cents. The witnesses for the Town of McCormick testified that nothing was said about contributing but that the books were offered to and sold to them for the sum of twenty-five cents each (Record, 7).

POINTS FOR ARGUMENT

I

Was appellant an itinerant preacher, a religious colporteur, primarily engaged in a religious activity, or was his activity that of selling books, primarily for the purpose of earning a livelihood?

II

Was the ordinance in question void and unconstitutional on its face and as construed and applied to a book agent's activities because it abridges and unduly burdens by taxation the exercise by appellant of his right of freedom of press, contrary to the First and Fourteenth amendments to the United States Constitution?

ARGUMENT

I

Was appellant an itinerant preacher, a religious colporteur, primarily engaged in a religious activity, or was his

activity that of selling books, primarily for the purpose of earning a livelihood?

In this case the appellant claims to be a minister of the Gospel. According to his own testimony, as shows on the certificate introduced in evidence (Record, 2), he was ordained to preach and commissioned by God Himself. Evidently every person becoming affiliated with the Watchtower Bible and Tract Society and taking the name of Jehovah's Witness immediately becomes ordained by God to preach and enjoys all the privileges usually accorded ministers of the Gospel, whether itinerant or resident. Accepting this theory there would be no earthly way for any person or Court to look beyond such co-called ordination and determine whether such person is in fact a minister. He merely signs a card claiming such ordination and is immediately sent forth by the Watchtower Bible and Tract Society. According to their theory he is not subject to any of the tax laws of the country whose protection appellant now so earnestly seeks nor is he subject to a call to the armed services of our country, because he is a self-styled "ordained minister." Respondent does not know what type of literature the Watchtower Bible and Tract Society distributes in other sections of this great nation, but as shown by the record, the literature sold and distributed in the Town of McCormick was not only anti-religious but actually advocates the overthrow and destruction of Democracy. While it is claimed on the certificate offered in evidence that Jehovah's Witnesses distribute Bibles there is no testimony in this case that appellant ever had a Bible in his hands or offered one for sale; nor is there any evidence that he ever attempted to preach or set forth his religious views. The record plainly shows that he is a common commercial book agent earning a livelihood by the sale of books.

Appellant takes the position that his activity is not subject to review by any Court since he says that he is a minister of the Gospel and his activity is that of a religious colporteur. According to his theory that ends the matter. Acting on this theory any concern could declare that its activity is no longer commercial, that henceforth the distribution of its wares and merchandise is for the purpose of saving men's souls and immediately the activities of such concerns are no longer taxable. Just as long as officials of the business say they are primarily interested in promulgating religious beliefs or disseminating information they are beyond the reach of the law.

It is obvious that this reasoning is absurd. If carried to the limit every person and every corporation would be exempt from taxation. Every doctor could say that he was no longer interested in practicing medicine but was following the example of Christ in healing the sick and was therefore exempt from payment of taxes on income received as compensation for his services and for medicine given. Every distributor of food could successfully contend that he was not engaged in the sale of merchandise but merely following Christ's example of furnishing food and drink to the people of this earth without thought of any profit that might incidentally come to him. Such merchant must immediately be classed as a minister of the Gospel and as such not subject to the rules and laws made by our national, state and municipal governments.

Any lawyer might declare himself to be an ordained minister and as such declare it to be his duty to practice law according to the precept dictated by his own conscience. A certificate could be given him by a county bar association declaring him to be a minister and, accepting appellant's view, this lawyer would no longer be bound by the laws of this country or by the rules of the Court. He could not be

punished by the Court for contempt because that would be forbidden by the First and Fourteenth amendments to the Constitution of the United States. No municipality could impose a license tax upon him, nor would the fees he received for advice be subject to a tax because he would no longer be practicing law but offering spiritual advice to the lost of the world.

If this theory of appellant cannot be adopted who, then, shall pass upon the question of whose activity is religious and whose activity commercial? Beyond doubt it must be by some branch of the government. Certainly neither the legislative nor executive branch of the government has the authority to make this determination. Only the judiciary can determine the matter. That is exactly what has been done in this case. Under the laws of South Carolina a jury determines the facts and in this case the jury determined that the activities of appellant were not those of a colporteur but were commercial; that he violated the ordinance in question when he sold books in the Town of McCormick after refusing to pay the required license fee. This finding of fact was sustained by the Circuit Court of General Sessions on appeal. Under the laws of South Carolina the finding of fact by the Circuit Court on appeal, cannot be reviewed by the Supreme Court of South Carolina *Dingle v. Northwestern R. Co. of S. C.*, 112 S. C., 390. However, the Supreme Court of South Carolina found that appellant's activities were commercial and not similar to those of the Jehovah Witness in the *Meredith case*.

Appellant has taken the position that no Court has the right to determine whether his activities are religious or commercial and counsel for appellant goes so far as to state: "The Judiciary has falsely labeled it as commercial." We think this shows very plainly appellant's attitude toward our government, including the Courts.

The real issue in this case is, does a municipality have the right to collect an ordinary nondiscriminatory tax from persons using the town's streets and other facilities of the municipality for commercial purposes? As the record clearly shows the appellant was endeavoring to make a living by selling books. No one would contend that the owner of a book store located in the Town of McCormick would be exempt from the payment of a license tax required by the town ordinance, even though a large part of the store's business consisted of the sale of Bibles and other religious books. Obviously appellant's position is untenable because the purpose of the store is primarily to make a profit on the sale of books and not to promote religious beliefs. If the store is subject to the payment of this license tax we respectfully submit that appellant, under the facts as found in this case, was due to pay the tax and his failure to do so constituted a violation of the ordinance in question.

II

Was the ordinance in question void and unconstitutional on its face and as construed and applied to a book agent's activities because it abridges and unduly burdens by taxation the exercise by appellant of his right of freedom of press, contrary to the First and Fourteenth amendments to the United States Constitution?

Appellant takes the position that even though it has been found and accepted as a fact that he was not acting as a religious colporteur when he sold the books in the Town of McCormick, yet his right of freedom of press, guaranteed to him by the First and Fourteenth amendments to the United States Constitution, has been violated. He seems to rely on the case of *Grosjean v. American Press Company*, 297 U. S., 233. However, we do not find where

this Court has ever held that publishers of books or newspapers or the sellers of the books are immune from any of the ordinary forms of taxation for the support of the government. On the contrary, this Court held in the *Grosjean case:* "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press." *Grosjean v. American Press Company,* 297 U. S., 250.

In the case now before this Court the Town of McCormick has not attempted to restrict the publication or distribution of any paper, book or other publication, but is simply requiring each person doing business for profit within the town limits of the Town of McCormick to pay an ordinary tax for the support of the municipal government. No attempt has been made to limit the number of books sold nor has any attempt been made to regulate the type of literature sold. The town is simply attempting to collect from appellant his reasonable share of taxes for the use of the conveniences provided by the municipality. He has had the use of the streets maintained by the Town of McCormick. He has had the protection of the health department, the police department and the fire department. Is it anything but reasonable to expect him to pay his share of the costs of providing these facilities?

Appellant seems especially alarmed over the ruling of this Court in *Valentine v. Chrestensen,* 316 U. S., 52, '54, and contends that the holdings in the *Chrestensen case* and the *Grosjean case* are at odds; that, in effect, the decision in the *Chrestensen case* reverses the *Grosjean case.* We cannot agree with appellant in this contention. In no case have we found that this Court has ever held that the constitutional provisions guaranteeing the freedom of the press

makes every person writing, printing, selling or distributing printed matter immune from the ordinary forms of taxation or reasonable laws regulating the publication, distribution and selling of papers, books, etc. Indeed, the Court has shown clearly, through all of its opinions in the various cases decided, that, while the freedom of press and freedom of religion is guaranteed by the Constitution, such freedom of religion and freedom of the press cannot be used as a sham to cover commercial activities and enable persons to evade the effect of other laws.

In the *Chrestensen case*, where the owner was attempting to disguise his activities by adding a civic appeal to the literature he sought to distribute, this Court said: "If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the street need only to append a civic appeal or a moral platitude to achieve immunity from the law's command." *Valentine v. Chrestensen*, 316 U. S., 55.

SUMMARY

In the present case we are not concerned with the type of literature appellant was selling. While we thoroughly disapprove of attempts, by the distribution of subversive literature, to undermine and overthrow our democratic form of government, for which our young men are fighting and dying on the battlefields today, we feel that this matter is not now before this Court. This is a matter which should, and probably will be, handled by the F. B. I. and our Federal Courts. What we are concerned with here is the attempt by appellant to use the plea of abridgment of constitutional rights as to freedom of worship and freedom of the press to evade his just share of the ordinary taxes demanded by our government for certain commercial activities. Presuming, for the sake of argument, that appellant has been or-

dained as a minister, it has been determined by the Mayor's Court of the Town of McCormick, the Circuit Court of General Sessions and the Supreme Court of South Carolina that the activities complained of were commercial and that appellant was not acting as a minister when he offered to and did sell books in the Town of McCormick without having obtained a license and paid the tax required. Since these facts have been judicially determined we submit no right guaranteed the appellant under the Constitution has been abridged.

CONCLUSION

The judgment of the Court below should be affirmed.

Respectfully submitted,

J. FRED BUZHARDT,
Town Attorney, McCormick,
South Carolina.

JEFF D. GRIFFITH,
Solicitor 11th Judicial Circuit,
Saluda, South Carolina.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 486

LESTER FOLLETT,
Appellant,
v.
TOWN OF McCORMICK, SOUTH CAROLINA,
Appellee.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF IN SUPPORT THEREOF

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
DOROTHY KENYON, *Counsel.*

MONROE LAZERE,
CLIFFORD FORSTER,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 486

LESTER FOLLETT,
Appellant,

v.

TOWN OF McCORMICK, SOUTH CAROLINA,
Appellee.

Motion for Leave to File Brief as *Amicus Curiae*

May it Please the Court:

The undersigned, as counsel for the American Civil Liberties Union, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the appellant, to the filing of this brief has been obtained. Attorney for the appellee has refused to grant his consent.

Special reasons in support of this motion are set out in the accompanying brief.

Dated January 31, 1944.

DOROTHY KENYON,
Counsel for American Civil Liberties Union,
As Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 486

LESTER FOLLETT,
Appellant,
v.
TOWN OF McCORMICK, SOUTH CAROLINA,
Appellee.

APPEAL FROM SUPREME COURT OF SOUTH CAROLINA

BRIEF OF *AMICUS CURIAE*

Statement

The American Civil Liberties Union whose aims, functions, and status are well-known to this Honorable Court has asked leave to file a brief *amicus curiae* on the argument of this appeal because it believes that important principles of civil liberties are here involved. To permit the decision of the South Carolina Supreme Court to stand, would in our opinion constitute a considerable limitation to the doctrines enunciated by this Court in the various literature distribution cases decided heretofore. No subtle legislative attempt nor dialectic evasion of *Murdock v. Pennsylvania*, 87 L. Ed. 827, should be countenanced in the application, meaning, and extent of that case.

The only substantial question here is whether a religious colporteur whose entire time is devoted to and whose sole source of income is derived from the sale of religious books which form the credo and are the interpretation of his religious views is engaged in commerce so as to make him liable to the provisions of a general license tax ordinance. This is not the case of whether a person who operates a book shop and sells books should pay a license tax, even though the books express ideas with which the bookseller is sympathetic. In the present case at least the issue is clear.

I. A license tax ordinance applied to the sale or distribution of religious literature by religious colporteurs is unconstitutional.

A. The ordinance in effect imposes a tax upon knowledge.

1. The distribution of circulars is an exercise of the right of free speech. *Lovell* v. *Griffin*, 303 U. S. 444. It would be difficult to overemphasize the importance of this type of activity in preserving our free institutions. The language of the brief *amicus curiae* filed by the Bill of Rights Committee of the American Bar Association in *Hague* v. *CIO*, 307 U. S. 496, and quoted with approval in Chafee, *Freedom of Speech in The United States* (1941), at page 417, has application here with equal force:

> "We desire to stress the importance of open-air meetings as a means of public discussion and education. * * * It is true that the press continues as a major vehicle of public discussion and that the new medium of radio occupies a large part of the field. Yet it is also true that the open-air meeting still fills a major role, and is indispensable in giving free public debate its traditional scope."
>
> * * * * * * *

> "The outdoor meeting is especially well adapted to the promotion of unpopular causes, since such causes are likely to command little financial support and therefore must often be promoted by persons who do not have the financial means to 'hire a hall' or purchase time on the radio."

This Court has transposed this thought into terms applicable to the case at bar, for it has recognized that religious tracts are distributed in order to educate and enlighten those the colporteur believes are living in ignorance of the Truth.

> "Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation."

Murdock v. *Pennsylvania*, 87 L. Ed. 827, 829.

2. The type of activity revealed by the record is the distribution of books and circulars both gratuitously and in return for a contribution or consideration. This aspect of the activities of Jehovah's Witnesses has been previously observed by this Court.

> "The Witnesses look upon their work as Christian and charitable. To them it is not selling books or papers but accepting contributions to further the work in which they are engaged."

Largent v. *Texas*, 87 L. Ed. 627, 628.

A flat tax on the privilege of so distributing literature must necessarily reduce the quantity of literature which the appellant can distribute without requiring a monetary return. Such a tax, therefore, is virtually a tax on circulation. And hence, the prohibition of *Grosjean* v. *American Press Co.*, 297 U. S. 233, at page 668, becomes applicable:

> "This court had occasion in Near *v.* Minnesota, supra (283 U. S. 713 et seq., 75 L. ed. 1366, 51 S. Ct. 625), to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraints on publication; and the court was careful not to limit the protection of the right to any particular way of abridging it. Liberty of the press within the meaning of the constitutional provision, it was broadly said (p. 716), meant 'principally although not exclusively, immunity from previous restraints or [from] censorship.'"

And again:

> "The taxes' imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom of the press and religion as the 'taxes on knowledge' at which the First Amendment was partly aimed. Grosjean *v.* American Press Co. supra (297 U. S. pp. 244-249, 80 L. ed. 665-668, 56 S. Ct. 444). They may indeed operate even more subtly."
>
> *Murdock* v. *Pennsylvania*, 87 L. Ed. 827, 833.

B. The ordinance is a tax upon the exercise of rights established by the federal constitution.

1. It is submitted that the oversimplified description of the appellant's activities as "book selling" obscures the

manner in which the tax infringes upon his exercise of freedom of speech and of religion. Where the litigated activity involves elements of ordinary business enterprise and elements of the exercise of constitutional liberties, the use of the normal language of property and commerce is unfortunate. For such language overlooks an important aspect of the case, the conflict between the state's interest in regulating or taxing business, and the individual's constitutional rights.

This point is illustrated by the cases involving the conflict between the state's interest in regulating traffic on its streets, and the individual's constitutional rights of free speech and assembly. In *Davis* v. *Massachusetts*, 167 U. S. 43, the analysis was made in terms of property rights. Subsequent refinements in the determination of such conflicts appear to have abandoned the property terminology in favor of language importing a balance of interests between state and individual. State licensing of the use of public streets for parades and assemblies is now permissible only if the licensor is not vested with "arbitrary power or unfettered discretion." (*Cox* v. *New Hampshire*, 312 U. S. 569; *Hague* v. *CIO*, 307 U. S. 496; *Jamison* v. *Texas*, 318 U. S. 413; and see note 11 Fordham L. R. 304 (1942).

In the instant case, the appellant's activities involve an exercise of his religion, for it appears to be the petitioner's religion to propagandize for his cause. Reworded, therefore, the question becomes: Is a person propagandizing for a cause subject to a license tax on the ground that he sustains himself by the sale of his propaganda?

This Court has refused to classify with ordinary business enterprises, the type of activity here revealed.

> "The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

Murdock v. *Pennsylvania*, 87 L. Ed. 827, 833.

2. That the appellant earned a livelihood in such activities, and that the appellant was a resident of the township seeking to impose the tax are immaterial. The use of the language of commerce must not be permitted to obscure the fundamental fact that the appellant's activity is primarily an exercise of the rights of freedom of speech and freedom of religion.

> "But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist however mis-

guided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses *or to sustain him.* Freedom of speech, freedom of religion are available to all, not merely to those who can pay their own way." (Italics ours.)

Murdock v. *Pennsylvania,* 87 L. Ed. 827, 831.

3. It is submitted that whether the appellant earns a livelihood by virtue of his activities is not an appropriate test of whether the appellant is engaged in either a commercial activity or in the exercise of a constitutional right.

(a) Literature may be distributed without charge and yet the activity may be appropriately labeled commercial. *Valentine* v. *Chrestensen,* 316 U. S. 52.

(b) A distributor hired by a political candidate to distribute free circulars advertising the candidate's record clearly could not be considered subject to an occupational tax. See *Lovell* v. *Griffin, supra.*

(c) The business aspect of newspaper publishing subjects it to some business taxes, but the constitutional liberty aspects of the same activity immunize it from other types of taxes. *Grosjean* v. *American Press, supra.*

(d) And religious colporteurs are clearly within the constitutional protection of freedom of speech and of religion. *Murdock* v. *Pennsylvania, supra.*

4. And since the rights of freedom of speech and of religion are not granted by the state, the state cannot tax the exercise thereof, merely on the ground that the appellant is a resident of the state.

"It is claimed, however, that the ultimate question in determining the constitutionality of this license

tax is whether the state has given something for which it can ask a return. That principle has wide applicability. State Tax Commission *v.* Aldrich, 316 U. S. 174, L. ed. 1358, 62 S. Ct. 1008, 139 A. L. R. 1436, and cases cited. But it is quite irrelevant here. This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. The privilege in question exists apart from state authority. It is guaranteed the people by the Federal constitution."

Murdock v. *Pennsylvania*, 87 L. Ed. 827, 833.

II. It is submitted that where literature is sold, the determination as to whether the activity falls within the ambit of constitutional protection should turn on whether the vendor is primarily a salesman or primarily a propagandist.

A. The test should be: Are the sales concomitant with the propagandizing or is the vendor's sympathy with the contents of the literature sold incidental to the sale? *Is the vendor primarily selling a commodity or an idea?*

Such a test may prove difficult of application in particular cases, but the distinction is vital. Propagandists of unpopular causes must somehow sustain themselves. Whether the money they collect as a result of their activities is labeled "contribution" or "consideration" is an academic problem in semantics. The fundamental fact remains that the propagandist's zeal impels him to pursue his course despite the inevitable realization that far better remuneration may be obtained by the sale of more popular works.

That such a test is workable is revealed by the experience of the courts of the State of New York in construing §51 of Civil Rights Law. This section reads:

> "Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages."

In the construction of this statute, the New York courts have held that where the particular publication is incidental to a legitimate interest in the subject matter, there is no cause of action under the statute, even though money is incidentally earned by such use. *Colyer* v. *Fox Publishing Co.*, 162 App. Div. 297 (2d Dept. 1914); *Humiston* v. *Universal Film Manufacturing Co.*, 189 App. Div. 467 (1st Dept. 1919); *Sidis* v. *F-R Pub. Corp.*, 34 F. Supp. 19, aff'd. 113 F. (2d) 806, cert. den. 311 U. S. 711.

Where, however, the publication is used primarily for purposes of advancing the sales of a product, rather than for its inherent interest, then there is a cause of action under the statute. *Binns* v. *Vitagraph Co.*, 210 N. Y. 51 (1913); *Martin* v. *New Metropolitan Fiction Inc.*, 237 App. Div. 863 (3d Dept. 1932).

This Court has already adopted half of the analogous tests applicable in the instant case.

> "The state can prohibit the use of the street for the distribution of purely commercial leaflets, even though such leaflets may have 'a civil appeal, or a

> moral platitude' appended. Valentine *v.* Chrestensen, 316 U. S. 52, 55, 86 L. Ed. 1262, 1265, 62 S. Ct. 920. They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes."
>
> *Jamison* v. *Texas*, 87 L. Ed. 629, 632.

In short, where literature is distributed *without consideration*, whether the activity is constitutionally protected turns on whether the distribution is made to advance a cause or to advance a commercial enterprise.

It remains for the Court to extend the test to the reverse side of the medallion—the case in which literature is *sold* pursuant to the advancing of an idea.

This Court has indicated its inclination in the direction of this test.

> "As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. On this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture. It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets. And the Pennsylvania court did not rest the judgments of conviction on that basis, though it did find that petitioners 'sold' the literature. The Supreme Court of Iowa in State *v.* Mean, 230 Iowa 1217, 300 N. W. 523, described the selling activities of members of this same sect as 'merely incidental and collateral' to their 'main object which was to preach and publicize the doctrines of their order.' And see State *v.* Meredith, 197 S. C. 351, 15 S. E. (2d) 678. People *v.* Barber, 289 N. Y. 378,

385, 386, 46 N. E. (2d) 329. That accurately summarizes the present record."

Murdock v. Pennsylvania, 87 L. Ed. 827, 831.

The instant case affords an opportunity to adopt the test.

CONCLUSION

The judgment of the Supreme Court of the State of South Carolina should be reversed.

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
DOROTHY KENYON, *Counsel*.

MONROE LAZERE,
CLIFFORD FORSTER,
of New York City,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 486.—October Term, 1943.

Lester Follett, Appellant,
vs.
Town of McCormick, South Carolina.
} Appeal from the Supreme Court of the State of South Carolina.

[March 27, 1944.]

Mr. Justice Douglas delivered the opinion of the Court.

Appellant was convicted of violating an ordinance of the town of McCormick, South Carolina which provided: ". . . the following license on business, occupation and professions to be paid by the person or persons carrying on or engaged in such business, occupation or professions within the corporate limits of the Town of McCormick, South Carolina: Agents selling books, per day $1.00, per year $15.00." Appellant is a Jehovah's Witness and has been certified by the Watch Tower Bible & Tract Society as "an ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus." He is a resident of McCormick, South Carolina, where he went from house to house distributing certain books. He obtained his living from the money received; he had no other source of income. He claimed that he merely offered the books for a "contribution". But there was evidence that he "offered to and did sell the books". Admittedly he had no license from the town and refused to obtain one. He moved for a directed verdict of not guilty at the close of the evidence, claiming that the ordinance restricted freedom of worship in violation of the First Amendment which the Fourteenth Amendment makes applicable to the States. The motion was overruled and appellant was found guilty by the jury in the Mayor's Court. That judgment was affirmed by the Circuit Court of General Sessions for McCormick County and then by the Supreme Court of South Carolina. — So. Car. —. The case is here on appeal. Judicial Code, § 237(a), 28 U. S. C. § 344(a).

The ordinance in this case is in all material respects the same as the ones involved in *Jones* v. *Opelika*, 319 U. S. 103, and *Murdock* v. *Pennsylvania*, 319 U. S. 105. In those cases, the tax imposed was also a license tax—"a flat tax imposed on the exercise

of a privilege granted by the Bill of Rights" and therefore an unconstitutional exaction. *Murdock* v. *Pennsylvania, supra,* p. 113. In those cases members of Jehovah's Witnesses had also been found guilty of "peddling" or "selling" literature within the meaning of the local ordinances. But since they were engaged in a "religious" rather than a "commercial" venture, we held that the constitutionality of the ordinances might not be measured by the standards governing the sales of wares and merchandise by hucksters and other merchants. "Freedom of press, freedom of speech, freedom of religion are in a preferred position." *Murdock* v. *Pennsylvania, supra,* p. 115. We emphasized that the "inherent vice and evil" of the flat license tax is that "it restrains in advance those constitutional liberties" and "inevitably tends to suppress their exercise." p. 114.

The Supreme Court of South Carolina recognized those principles but distinguished the present case from the *Murdock* and *Opelika* decisions. It pointed out that the appellant was not an itinerant but was a resident of the town where the canvassing took place, and that the principle of the *Murdock* decision was applicable only to itinerant preachers. It stated, moreover, that appellant earned his living "by the sale of books", that his "occupation was that of selling books and not that of colporteur", that "the sales proven were more commercial than religious." It concluded that the "license was required for the selling of books, not for the spreading of religion."[1]

We pointed out in the *Murdock* case that the distinction between "religious" activity and "purely commercial" activity would at times be "vital" in determining the constitutionality of flat license taxes such as these. 319 U. S. p. 110. But we need not determine here by what tests the existence of a "religion" or the "free exercise" thereof in the constitutional sense may be ascertained or measured. For the Supreme Court of South Carolina conceded that "the book in question[2] is a re-

[1] The court also distinguished State v. Meredith, 197 S. C. 351, where a license tax statute was construed to be inapplicable to an itinerant minister of Jehovah's Witnesses, the "sale" of literature being "merely collateral to the main purpose in which he was engaged, which was to preach and teach the tenets of his religion." p. 355.

[2] Though appellant distributed more than one tract or book, the only one before the Supreme Court of South Carolina was entitled "Children". As stated by that court, "Tested by the tenets of other forms of the Christian religion with which we are familiar, it is full of heresies. But it purports to offer a plan of salvation of the human soul in life after death . . . ."

ligious book"; and it concluded "without difficulty" that "its publication and distribution come within the words, 'exercise of religion', as they are used in the Constitution." We must accordingly accept as *bona fide* appellant's assertion that he was "preaching the gospel" by going "from house to house presenting the gospel of the kingdom in printed form." Thus we have quite a different case from that of a merchant who sells books at a stand or on the road.

The question is therefore a narrow one. It is whether a flat license tax as applied to one who earns his livelihood as an evangelist or preacher in his home town is constitutional. It was not clear from the records in the *Opelika* and *Murdock* cases to what extent, if any, the Jehovah's Witnesses there involved were dependent on "sales" or "contributions" for a livelihood. But we did state that an "itinerant evangelist" did not become "a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him." 319 U. S. p. 111. Freedom of religion is not merely reserved for those with a long purse. Preachers of the more orthodox faiths are not engaged in commercial undertakings because they are dependent on their calling for a living. Whether needy or affluent, they avail themselves of the constitutional privilege of a "free exercise" of their religion when they enter the pulpit to proclaim their faith. The priest or preacher is as fully protected in his function as the parishioners are in their worship. A flat license tax on that constitutional privilege would be as odious as the early "taxes on knowledge" which the framers of the First Amendment sought to outlaw. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245-248. A preacher has no less a claim to that privilege when he is not an itinerant. We referred to the itinerant nature of the activity in the *Murdock* case merely in emphasis of the prohibitive character of the license tax as so applied. Its unconstitutionality was not dependent on that circumstance. The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious (*Grosjean* v. *American Press Co.*, *supra*; *Murdock* v. *Pennsylvania*, *supra*) as the imposition of a censorship or a previous restraint. *Near* v. *Minnesota*, 283 U. S. 697. For, to repeat, "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock* v. *Pennsylvania*, *supra*, p. 112.

But if this license tax would be invalid as applied to one who preaches the Gospel from the pulpit, the judgment below must be reversed. For we fail to see how such a tax loses its constitutional infirmity when exacted from those who confine themselves to their own village or town and spread their religious beliefs from door to door or on the street. The protection of the First Amendment is not restricted to orthodox religious practices any more than it is to the expression of orthodox economic views. He who makes a profession of evangelism is not in a less preferred position than the casual worker.

This does not mean that religious undertakings must be subsidized. The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the *Murdock* case, 319 U. S. p. 112. But to say that they like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege.

Reversed.

Mr. Justice REED, concurring.

My views on the constitutionality of ordinances of this type are set out at length in *Jones* v. *Opelika*, 316 U. S. 584, and in a dissent on the rehearing of the same case, 319 U. S. 117. These views remain unchanged but they are not in accord with those announced by the Court.

My understanding of this Court's opinions in *Murdock* v. *Pennsylvania*, 319 U. S. 105, and *Jones* v. *Opelika*, 319 U. S. 103, is that distribution of religious literature in return for money when done as a method of spreading the distributor's religious beliefs is an exercise of religion within the First Amendment and therefore immune from interference by the requirement of a license. These opinions are now the law of the land.

As I see no difference in respect to the exercise of religion between an itinerant distributor and one who remains in one general neighborhood or between one who is active part time and another who is active all of his time, there is no occasion for me to state again views already rejected by a majority of the Court. Consequently, I concur in the conclusion reached in the present case.

Mr. Justice MURPHY, concurring.

While I am in complete accord with the opinion of the Court, I desire to add a brief word in light of certain statements made in the dissenting opinion. It is claimed that the effect of our decision is to subsidize religion. But this is merely a harsh way of saying that to prohibit the taxation of religious activities is to give substance to the constitutional right of religious freedom.

It is suggested that we have opened the door to exemption of wealthy religious institutions, like Trinity Church in New York City, from the payment of taxes on property investments from which support is derived for religious activities. It is also charged that the decision contains startling implications with respect to freedom of speech and the press. I am neither disturbed nor impressed by these allegations. We are not called upon in this case to deal with the taxability of income arising out of extensive holdings of commercial property and business activities related thereto. There is an obvious difference between taxing commercial property and investments undertaken for profit, whatever use is made of the income, and laying a tax directly on an activity that is essentially religious in purpose and character or on an exercise of the privilege of free speech and free publication.

It is wise to remember that the taxing and licensing power is a dangerous and potent weapon which, in the hands of unscrupulous or bigoted men, could be used to suppress freedoms and destroy religion unless it is kept within appropriate bounds.

Separate opinion of Mr. Justice ROBERTS, Mr. Justice FRANKFURTER and Mr. Justice JACKSON.

The present decision extends the rule announced in *Jones* v. *Opelika*, 319 U. S. 103, and *Murdock* v. *Pennsylvania*, 319 U. S. 105.

The ordinance in question is not, in the words of the First Amendment, a law "prohibiting the free exercise" of religion. At the outset it should be observed that the ordinance is not discriminatory. It lays a tax on the pursuit of occupations by which persons earn their living in the Town of McCormick. It does not single out persons pursuing any given occupation and exempt others. If it were attacked as a denial of the equal protection of

the laws the contention would be frivolous.[1] There is no suggestion that the purpose is other than to raise revenue necessary for the support of government from all who enjoy the service and protection of government, and to adjust the tax laid on the appellant in the light of the aid he derives from such service and protection.

Secondly, the ordinance lays no onerous burden on the occupation of the appellant or any other citizen. The tax in question is wholly unlike that considered in *Grosjean* v. *American Press Co.*, 297 U. S. 233, which had the unmistakable purpose of hitting at one out of many occupations and hitting so hard as to discourage or suppress the pursuit of that calling. The court there said: (p. 250)

"It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press."

What then is the law under attack? It is a revenue measure applying generally to those earning their living in the community. It is a monetary exaction reasonably related to the cost of maintaining society by governmental protection, which alone renders civil liberty attainable.

Follett is not made to pay a tax for the exercise of that which the First Amendment has relieved from taxation. He is made to pay for that for which all others similarly situated must pay,—an excise for the occupation of street vending. Follett asks exemption because street vending is, for him, also part of his religion. As a result, Follett will enjoy a subsidy for his religion. He will save the contribution for the cost of government which everyone else will have to pay.

The present decision extends and reaches beyond what was decided in *Murdock* v. *Pennsylvania, supra.* There the community asserted the right to subject transient preachers of religion to taxation; there the court emphasized the "itinerant" aspect of the activities sought to be subjected to the exaction. The emphasis there was upon the casual missionary appearances of Jehovah's Witnesses in the town and the injustice of subjecting them to a general license tax. Here, a citizen of the community, earning his living in the community by a religious activity, claims immunity

[1] Clark v. Titusville, 184 U. S. 329; Southwestern Oil Co. v. Texas, 217 U. S. 114, 121; Bradley v. Richmond, 227 U. S. 477.

from contributing to the cost of the government under which he lives. The record shows appellant "testified that he obtained his living from the money received from those with whom he placed books, that he had no other source of income."

Unless the phrase "free exercise", embodied in the First Amendment, means that government must render service free to those who earn their living in a religious calling, no reason is apparent why the appellant, like every other earner in the community, should not contribute his share of the community's common burden of expense. In effect the decision grants not free exercise of religion, in the sense that such exercise shall not be hindered or limited, but, on the other hand, requires that the exercise of religion be subsidized. Trinity Church, owning great property in New York City, devotes the income to religious ends. Must it, therefore, be exempt from paying its fair share of the cost of government's protection of its property?

We cannot ignore what this decision involves. If the First Amendment grants immunity from taxation to the exercise of religion it must equally grant a similar exemption to those who speak and to the press. It will not do to say that the Amendment, in the clause relating to religion, is couched in the imperative and, in the clause relating to freedom of speech and of press, is couched in the comparative. The Amendment's prohibitions are equally sweeping.[2] If exactions on the business or occupation of selling cannot be enforced against Jehovah's Witnesses they can no more be enforced against publishers or vendors of books, whether dealing with religion or other matters of information. The decision now rendered must mean that the guarantee of freedom of the press creates an immunity equal to that here upheld as to teaching or preaching religious doctrine. Thus the decision precludes non-oppressive, nondiscriminatory licensing or occupation taxes on publishers, and on news vendors as well, since, without the latter, the dissemination of views would be impossible. This court disavowed any such doctrine with respect to freedom of the press in *Grosjean v. American Press Co.*, *supra*, and it is unthinkable that those who publish and distribute for profit newspapers and periodicals should suggest that they are in a class apart, untouchable by taxation upon their enterprises for the support of the government which makes their activities possible.

[2] "Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech, or of the press"; . . . .

Not only must the court, if it is to be consistent, accord to dissemination of all opinion, religious or other, the same immunity, but, even in the field of religion alone, the implications of the present decision are startling. Multiple activities by which citizens earn their bread may, with equal propriety, be denominated an exercise of religion as may preaching or selling religious tracts. Certainly this court cannot say that one activity is the exercise of religion and the other is not. The materials for judicial distinction do not exist. It would be difficult to deny the claims of those who devote their lives to the healing of the sick, to the nursing of the disabled, to the betterment of social and economic conditions, and to a myriad other worthy objects, that their respective callings, albeit they earn their living by pursuing them, are, for them, the exercise of religion. Such a belief, however earnestly and honestly held, does not entitle the believers to be free of contribution to the cost of government, which itself guarantees them the privilege of pursuing their callings without governmental prohibition or interference.

We should affirm the judgment.